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Supreme Court of the United States.

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OCTOBER TERM, 1903.

No. 453.

STATE OF MINNESOTA,
Appellant,

vs.

NORTHERN SECURITIES COMPANY, GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, et al.,
Appellees.

BRIEF ON BEHALF OF APPELLANT.

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Of Counsel.



30273

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STATE OF MINNESOTA,

Appellant,

vs.

NORTHERN SECURITIES COMPANY, GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, et al.,

Appellees.

BRIEF ON BEHALF OF APPELLANT.

I.

This is an action brought by the State of Minnesota in its capacity as a governmental or sovereign body on behalf of all the people of the State, and also in its individual or corporate capacity, for the purpose of enjoining the consolidation of the Great Northern and Northern Pacific Railway Companies, which corporations respectively own parallel and competing lines of railway within the State of Minnesota.

It was tried in the Circuit Court of the United States for the Eighth Circuit, before Judge Lochren, one of the District Judges in that Circuit, upon a bill of complaint, separate answers by appellees and about twelve hundred pages of printed testimony and exhibits. A decision was rendered against appellant, on which a decree was entered September 9th, 1903. From this decision and judgment an appeal was allowed and taken direct to this Court.

The decision of the Court is found at Fols. 415 to 500. pages 104a to 126a of the record.

(It should be borne in mind, in referring to this record, that while the pleadings, orders, decision and all appeal papers were printed in a separate volume, the Clerk has had them bound in one volume with the evidence, and they appear on pages 1 to 136a of the record. The testimony appears immediately following on pages 1 to 1197 of the record).

The decree and decision is claimed to be erroneous in holding that the Northern Securities Company was not organized for the purpose of consolidating the two appellee railway companies, and that the ownership of the stock of the two railway companies by the Northern Securities Company does not amount to a consolidation within the meaning of the acts set forth in Appellant's bill; and also that the Northern Securities Company does not, in fact, control the two railway companies by virtue of its ownership of the stock of such railway companies; and also in not holding that the Northern Securities Company was intended by its incorporators to be

and is, in fact, a device for evading and violating the laws of appellant set forth in its bill; and also in holding that the action of the stockholders of the Great Northern and Northern Pacific Railway Companies in the formation of the Northern Securities Company, and exchanging their stock holdings in said railway companies for the stock of said Northern Securities Company, did not amount to a consolidation of said two railway companies within the meaning of said acts; and also in holding that the Northern Securities Company is not a purchaser and manager of the two railway companies within the meaning of said acts; and also that said decision is erroneous in holding that the formation of the Northern Securities Company, in the manner shown by the testimony, did not amount to a violation of Chapter 359 of the General Laws of Appellant for the year 1899; also that the decision is erroneous in not holding that the exercise of the powers of said Northern Securities Company, under its charter, over the stock of the Great Northern and Northern Pacific Railway Companies in violation of the laws of appellant, is [redacted] an invasion of a right guaranteed to appellant under Section 1, Article IV of the Constitution of the United States; and also in holding that appellant could not avail itself of the act of Congress, passed July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

These various claims are covered by the following assignments of error, each of which is urged by appellant. These assignments appear at folios 507 to

525, pages 128a to 132a of the record:

(1) The Court erred in ordering and decreeing that complainant's bill of complaint herein be dismissed.

(2) The Court erred in finding and holding that the agreement, scheme or plan, set forth in complainant's bill of complaint, and shown by the testimony, and which contemplated and resulted in the organization of the Northern Securities Company, with power to purchase, or acquire by exchange, a majority of the stock of both the Great Northern and Northern Pacific Railways, is lawful.

(3) The Court erred in finding and holding that the Northern Securities Company was organized for a lawful purpose.

(4) The Court erred in finding and holding that the Northern Securities Company is merely an investing stockholder in the stocks of the Great Northern and Northern Pacific Railway Companies.

(5) The Court erred in finding and holding that the Northern Securities Company is without power to interfere with the management or to control the Great Northern and Northern Pacific Railway Companies, or either of them.

(6) The Court erred in finding and holding that the Board of Directors of the Great Northern and Northern Pacific Railway Companies will control the business and affairs of its own corporation uninfluenced by the Northern Securities Company, or its officers.

(7) The Court erred in finding and holding that the power of the Northern Securities Company by virtue of its large holdings of stock in each of said railway companies is limited to the election of the Board of Directors of each of said companies.

(8) The Court erred in failing to find and decide that the Northern Securities Company was organized for the express purpose of getting control, by purchase or exchange, of a majority of the stock of each of said railway companies, and by virtue of such stockholdings to manage and control the business and affairs of each of said railway companies, their respective officers and employes.

(9) The Court erred in failing to find and decide that the Northern Securities Company was organized, in manner and form alleged in complainant's bill, for the purpose and with the intent of evading and avoiding the laws of the complainant state, prohibiting any railroad corporation or the lessees, purchasers or managers of any railroad corporation from consolidating the stock, property or franchise of such corporation with, or to lease or purchase the works or franchise of or in any way control any other railroad corporation owning or having under its control a parallel or competing line.

(10) The Court erred in finding and holding that the formation of the Northern Securities Company in the manner shown by the testimony, and the acquisition by it of a majority of the stock of

the Great Northern and Northern Pacific Railway Companies in the manner and for the purposes shown in said testimony, is not a violation of Chapter 29 of the General Laws of the State of Minnesota for the year 1874; and also Chapter 94 of the General Laws of the State of Minnesota for the year 1881, set forth in complainant's bill of complaint.

(11) The Court erred in finding and holding that the formation of the Northern Securities Company in the manner shown by the testimony and the acquisition by it of a majority of the stock of the Great Northern and Northern Pacific Railway Companies in the manner and for the purposes shown in said testimony is not a violation of Chapter 359 of the General Laws of the State of Minnesota for the year 1899, set forth in complainant's bill of complaint.

(12) The Court erred in finding and holding that the acts of said defendants, and each of them, set forth in said bill of complaint, and as shown by the testimony, does not constitute a violation of each of said laws referred to in assignments numbered ten and eleven.

(13) The Court erred in finding and holding that the Northern Securities Company is not a railroad corporation within the meaning and intent and purpose of Chapter 29 of the General Laws of Minnesota for the year 1874.

(14) The Court erred in finding and holding

that the Northern Securities Company is not a purchaser of the Great Northern and Northern Pacific Railways within the meaning and intent of Chapter 29 aforesaid.

(15) The Court erred in finding and holding that the Northern Securities Company is not a manager of any railroad company within the meaning of said Chapter 29.

(16) The Court erred in finding and holding that the evidence fails to show that the Northern Securities Company was formed for the purpose of acquiring and controlling a majority of the stock of the Great Northern as well as that of the Northern Pacific Railway Company.

(17) The Court erred in finding and holding that the acts of the individual stockholders in promoting the unlawful combination charged in the bill of complaint, and as shown by the testimony, were not the acts of said Railway Corporations, and cannot be attributed to said railway corporations.

(18) The Court erred in finding and holding that after the Northern Securities Company had purchased and become the owner of a large majority of the stock of the Northern Pacific Railway Company it was not disabled thereby from afterwards acquiring a majority of the stock of the Great Northern Railway Company; and in holding and finding that in neither case was it a purchaser of a railroad company within the meaning of the laws of this state set forth in complainant's bill.

(19) The Court erred in finding and holding that the Northern Securities Company, by virtue of its ownership of a majority of the stock of each of said railway companies, had no power to manage or to direct the management or the operation of either railroad in respect to rates or charges for transportation or otherwise.

(20) The Court erred in finding and holding that none of the defendants have violated the provisions of Chapter 359 of the Laws of the State of Minnesota for the year 1899.

(21) The Court erred in finding and holding that the agreement or arrangement under which the Northern Securities Company was organized, and the organization thereof, to purchase and the purchase by it of a majority and controlling interest of the stock of each of said railway companies, are not acts or contracts in restraint of trade or commerce within the State of Minnesota or without the State of Minnesota, and do not constitute a violation of the state laws set forth in complainant's bill or the National Anti-trust Law, referred to in said bill.

(22) The Court erred in finding and holding that the ownership of a majority of the stock of both of said railway companies by said Northern Securities Company would not suppress or does not tend to suppress competition between said railway companies in either state or interstate commerce.

(23) The Court erred in finding and holding that the formation of the Northern Securities Com-

pany, and its holding of stock in said two railway companies, has not, and cannot have, anything to do directly or indirectly with trade, commerce, transportation or rates within the State of Minnesota, or along the lines of said railway companies.

(24) The Court erred in finding and holding that it was not sufficient to entitle complainant to relief that the Northern Securites Company may, by reason of the combination, scheme or plan set forth in the bill of complaint, or by the purchase of a majority of the stock of each of said railway companies, have acquired the power to suppress competition between the two said defendant railway companies.

(25) The Court erred in finding and holding that the complainant could not avail itself of the provisions of the Act of Congress, passed July 2d, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," being Chapter 647 of the Act of Congress for the year 1890.

(26) The Court erred in finding and holding that the plan and purpose of organizing the Northern Securities Company for the purpose and in the manner set forth in complainant's complaint, and as shown by the testimony; and the subsequent consummation of such plan and purpose by the issuance and exchange of the stock of the Northern Securities Company for a majority of the stock of the Great Northern and Northern Pacific Railway Com-

panies, did not invade and violate the rights guaranteed to the State of Minnesota under Article 4 of the Constitution of the United States.

(27) The Court erred in finding and holding that the formation of the Northern Securities Company under the laws of the State of New Jersey for the purpose set forth in complainant's complaint, and as shown by the testimony; and the attempt of the incorporators of said Northern Securities Company to avail themselves of the sovereign power of New Jersey, delegated by said laws, for the purpose set forth in complainant's complaint, and as shown by the testimony, did not constitute a violation of the right guaranteed to the State of Minnesota under said Article 4 of the Constitution of the United States, which provides that full faith and credit shall be given in each state to the public acts and records of every other state.

(28) The Court erred in ordering and decreeing that appellant was not entitled to the relief prayed for, or to any relief in said action.

(29) The Court's Findings of Fact and Conclusions of Law, hereinbefore specified, are not justified by the evidence and are severally contrary to law.

II.

ADMITTED OR PROVEN FACTS IN THE CASE

In 1874 the legislature of the State of Minnesota passed chapter twenty-nine (29), which provides as follows:

"Section 1. No railroad corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line."

In the year 1881, the Legislature of the State passed an act which provided, among other things, the following:

"No railroad corporation shall consolidate with, lease or purchase, or in any way become the owner of or control any other railroad corporation or stock, franchises, rights or property thereof, which owns or controls a parallel or competing line."

In the year 1899 the Legislature of the State passed Chapter 359 of the General Laws for that year which provides among other things as follows:

"Section 1. Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this State, or in restraint of trade or commerce between any of the people of this State and any of the people of any other State or Country, or which limits or tends to limit or control the supply of any article,

commodity or utility, or the articles which enter into the manufacture of any article [of] utility, or which regulates, limits or controls or raises or tends to regulate, limit, control or raise the market price of any article, commodity or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production, purchase or sale of any commodity, article or utility is hereby prohibited and declared to be unlawful.

That when any corporation heretofore or hereafter created, organized or existing under the laws of this State, whether general or special, hereafter unites in any manner with any other corporation wheresoever created, or with any individual, whereby such corporation surrenders or transfers, by sale or otherwise, in whole or in part, its franchise, rights or privileges or the control or management of its business to any other corporation or individual, or whereby the business management or control of the business of such corporation is limited, changed or in any manner affected, and the purpose or effect of such union or combination is to limit, control or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of any article or commodity or the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination is to control or monopolize in any manner the trade or commerce, or any part thereof, of this State, or of the several States, such union, combination, agreement, arrangement or contract is hereby prohibited and declared to be unlawful.

* * * * * * * *

Sec. 3. Any corporation heretofore or hereafter created, organized or existing under the laws of this State which shall hereafter either directly or indirectly make any contract, agreement or manage-

ment, or enter into any combination, conspiracy or trust as defined in section one (1) of this act, shall, in addition to the penalty prescribed in section two (2) of this act, forfeit its charter, rights and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust or monopoly, except as to the final disposition of its property under the laws of this state.

* * * * * * * * *

Sec. 6. That for the purpose of carrying out the provisions of this act, any citizen of this State may, and it is hereby declared to be the duty of the Attorney General to institute, in the name of the State, proceedings in any court of competent jurisdiction against any person, partnership, association or corporation who may be guilty of violating any of the provisions of section one (1) of this act, for the purpose of imposing the penalties imposed by this act, or securing the enforcement of section three (3) hereof.

Sec. 8. This act shall take effect and be in force from and after its passage.

Approved April 21st, 1899."

The Great Northern Railway Company is a corporation created under the laws of the State of Minnesota, and owning various lines of railway extending through the northern portion of the State of Minnesota.

The Northern Pacific Railway Company is a corporation organized under the laws of the State of Wisconsin, but which thereafter filed its Articles of Incorporation with the Secretary of State for the State of Minnesota, and thereby became, under the laws of the State of Minnesota, a corporation of this State.

The Northern Pacific Railway Company is the owner of a number of lines of railway extending through and over the northern portion of the State of Minnesota; and the lines of railway of both the Great Northern and Northern Pacific are parallel and competing with each other, within the State of Minnesota, having upwards of thirty junction points within the State and running generally parallel to each other, and only a very few miles apart, through a large portion of their extent in the State of Minnesota. Both the Great Northern and Northern Pacific Railway Companies are the recipients of valuable land grants from the State of Minnesota made to each, or to subsidiary companies, which constructed a portion of the lines of railway now owned and operated by said Railway Companies.

The State of Minnesota is the owner of and maintains a large number of charitable and educational institutions within the State, many of which are situated along the lines of the Great Northern and Northern Pacific Railway Companies, and are largely dependent upon those companies for the transportation of supplies and occupants, which the State of Minnesota purchases and maintains in such institutions.

The State of Minnesota also owns a large amount of lands in the territory tributary to the lines of the Great Northern and Northern Pacific Railway Companies, the value of which lands is largely affected by the rates on freight and passengers, to and from the locality where such lands are situated.

These conditions existed on and prior to January 1st, 1902.

During the early part of the year 1901 J. P. Morgan and J. J. Hill who respectively dominated and practically controlled the Northern Pacific and Great Northern Railway companies, decided to purchase for said railway companies the property and franchises of the Chicago, Burlington & Quincy Railroad Company, a corporation owning upwards of eight thousand miles of railroad, a small portion of which was within the State of Minnesota; and for that purpose acquired substantially all of the stock of said last named Company, and had issued in payment therefor, for each dollar of stock so acquired, two dollars in four per cent joint collateral bonds of said C. B. & Q. railroad company guaranteed by said Northern Pacific and Great Northern Railway Cos.

No official action was taken by the stockholders or directors of either the Great Northern or the Northern Pacific Cos. relating to this purchase until some time in the spring of 1901 and long after Messrs. Hill and Morgan had agreed upon the same with a committee representing the C. B. & Q. Co. 2121-6
See folios 221 and 2 of record. also 2116 – 2122 also 3035

On and since January 1st, 1901, the Great Northern Railway Company has had an authorized capitalization of $125,000,000.00 par value, of which amount $123,880,400.00 par value has been issued. On the same date the Northern Pacific Railway Company had an authorized and issued capitalization of $155,000,000.00 par value, $75,000,000 of

which was preferred stock and $80,000,000.00 of which was common stock; the preferred stock being subject to retirement on the first day of January each year from January 1st, 1901, until January 1st, 1917. The preferred and common stock had equal voting powers in the election of all officers of the Northern Pacific Railway Company selected by its stockholders.

During April, 1901, demand was made on Hill and Morgan, by certain of the large stockholders of the Union Pacific Railway Co. who owned some stock of the Northern Pacific, for representation on the board of directors of the latter company and an interest in said purchase. (See Folios 304-9). This demand was refused by Hill and Morgan; during the latter part of April and the early part of May, 1901, interests adverse to the Great Northern Railway Company and the plans of Mr. Morgan and Mr. Hill, began buying the preferred and common stock of the Northern Pacific Railway Company; and on or prior to May 9th of that year, had acquired $37,023,000 par value of the common and $41,085,000 par value of the preferred stock, thus obtaining a clear majority of the total capital stock of the Northern Pacific Railway Company. This stock was taken in the name of Mr. Harriman and Mr. Pearce as trustees for the so-called Union Pacific Railway Company's interests. (See Folio 322 et seq, of Record).

As soon as Mr. Hill and Mr. Morgan learned this fact, Mr. Morgan bought, in the open market $15,000,000 par value of the common stock of the

Northern Pacific Railway Company. (See Fol. 1937 of the record). This made a total holding by Mr. Morgan and his associates of between $41,000,000 and $42,000,000 par value of the common stock of the Northern Pacific Railway Company, a clear majority of that class of stock. (See Fol. 1855, of the record). Thus, after May 9th, 1901, J. P. Morgan and his associates were the holders of a majority of the common stock of the Northern Pacific Railway Company; while Mr. Harriman and Mr. Pearce, acting for the Union Pacific interests, were the holders of a majority of the preferred and common combined, and could elect the board of directors at the annual election to be held in the following October.

For many years prior to November 13th, 1901, the Great Northern Railway Company had been managed and controlled by Mr. Hill, who, with certain stockholders referred to in the testimony as Mr. Hill's associates, and among whom were Mr. Kennedy, Mr. Baker, Mr. Thorne, Mr. James, Lord Strathcona and Lord Mount Stevens, owned about $35,000,000.00 of the issued capital stock of that company. These gentlemen above named, aside from Mr. Hill, seldom, if ever, attended any meetings of the stockholders of the company, but always sent their proxies to Mr. Hill. These gentlemen, as well as most all the other stockholders of the Great Northern Railway Company, left the management of that company and the determination of its policy to Mr. Hill. Mr. Hill had, without contro-

versy or opposition, been able to control the Great Norhern Railway Company for many years prior to the organization of the Northern Securities Company. In fact the Great Northern Railway Company was known as Mr. Hill's road. On this subject Mr. Hill testified as follows:

> "Witness: I may say that I think I controlled the policy of the Great Northern Railway Company and its predecessor as fully as the policy of any railway ever was controlled in this country, and I never owned over ten or twelve per cent—I never owned a majority of the stock, but I always had a following of good, loyal stockholders, and the men who were most active, covering about 33 or 35 millions out of 125 millions, practically formed the company, and they desired that their other shareholders, whoever they were, new or old, might participate in anything that they were doing, if they thought it would be any advantage to them as shareholders.
>
> Q. And so, in order to continue the policy which had obtained for so many years for the benefit of the company and of the public, they arranged to put their holdings into this holding corporation—these shareholders?
>
> A. The eleven shareholders?
>
> Q. Yes.
>
> A. And asked that the same offer be made to all the shareholders so that they might not be charged with any discrimination, or doing anything for themselves that they were not willing to do for all the shareholders.
>
> Q. Exactly. Now, would the policy be perpetuated or the interest protected if less than a majority of the stock of the Great Northern had gone into the holding corporation?
>
> A. Oh, yes, sir." (See Fols. 3811-3812-3813 of the record).

Mr. Baker testifies (Fol. 1656, of the record) as follows:

> Q. The Great Northern Railway Company had always been substantially under the control of Mr. Hill, so far as the determination of its policy was concerned, during all the time you were a stockholder of that company, had it not?
>
> A. I think so.
>
> Q. In other words, it was known among you gentlemen as Mr. Hill's road?
>
> A. Yes, sir.
>
> Q. And you gentlemen, including yourself and the other parties making up this coterie, as well as many others, had always left it entirely to Mr. Hill so far as the voting of your stock was concerned, sending your proxies?
>
> A. Yes, sir."

On the same subject, Mr. Kennedy testified (Fol. 1591, of the record) as follows:

> "Q. For some years prior to this time, yourself and Mr. Hill, and some other friends of both yourself and Mr. Hill, had had holdings amounting to about thirty-five millions, in the Great Northern Railway Company, had you not?
>
> A. That depends upon the time you refer to.
>
> Q. Well, for six months preceding July 1, 1901.
>
> A. My recollection is that Mr. Hill and friends of his (some of whom I don't know) held right along for some years from 25 to 30 per cent of the stock of the Great Northern Railway Company, and the amount which you refer to; I think it was thirty-five millions.
>
> Q. Yes.
>
> A. Yes. That would be less than a third in volume of the stock then outstanding.
>
> Q. And the holders of this amount of stock had always co-operated, so far as the determina-

tion of the policy of the Great Northern Railway Company was concerned, and the development of its railway system, had they not?

A. Well, I can't say that. We were stockholders, and so far as I was concerned I had confidence in Mr. Hill and his management. I always gave him my proxy as a stockholder, naturally would; and I believe not only these particular persons you refer to, but I think that at least nine-tenths of the stockholders always did send their proxies to Mr. Hill for an annual election. But when you talk about controlling the policy, I had nothing to do with the policy of the company."

The gentlemen and coterie of stockholders referred to in the above testimony were known as Mr. Hill's associate stockholders of the Great Northern Railway Company, as above stated.

From the re-organization of the Northern Pacific Railway Company, which took place in 1896, down to May 9th, 1901, the Northern Pacific Railway Company had been substantially under the control of J. P. Morgan of the firm of J. P. Morgan & Co., and certain associate stockholders with him in that company. J. P. Morgan had been a member and chairman of the board of three voting trustees, who had voted all of the stock of the Northern Pacific Railway Company during the continuance of the voting trust, which was in force from the re-organization of the Northern Pacific Railway Company till January 1st, 1901.

Relative to the control of the Northern Pacific Railway Company prior to the organization of the

Northern Securities Company, Mr. Morgan testified as follows:

> "We had re-organized the Northern Pacific. We had placed all the securities of the Northern Pacific, and I knew, as I had always supposed, that there were people—friends of ours and other people—who held practically enough Northern Pacific—we always supposed we had with us people upon whom we could depend to protect our moral control of the property—and consequently when that news came to me I hadn't any doubt about the fact of the matter, and at the same time this news came so strong, whoever had acquired it. I felt something must have happened. Somebody must have sold. I knew where certain stocks were, and I figured it up. I feel bound in all honor when I reorganize a property and am morally responsible for its management to protect it, and I generally do protect it; so I made up my mind that it would be desirable to buy 150,000 shares of stock, which we proceeded to do, and with that I knew we had a majority of common stock, and I knew that actually gave us the control and they couldn't take the minority and have it sacrificed to the Union Pacific interests" (See Fol. 2150 of the record).

Again at Folio 2194, Mr. Morgan said:

> "Mr. Kennedy and I were in Aix. He came down to see what in the mischief all this meant. I said I didn't know. He said, 'I am going to cable over to tell them to put my stock into your office. * * * Whatever you want done I want done with my Northern Pacific.' That is the way people treated me in the Northern Pacific. Whatever I was willing to do they wanted, and they wanted to put the stock just where I said to keep it safe. That is what they wanted. * * * It was a question of who held stock in the Northern Pacific,

and the men in the Northern Pacific wanted my policy, or our policy, from the reorganization carried out."

In order for Morgan and his associates to regain control of the Northern Pacific Railway Co., it was necesary to retire the preferred stock; nor could the plans of Hill and Morgan relative to placing the control of the two railway companies in a single holding company be carried out unless said preferred stock was retired. Thereupon Mr. Morgan and his associates agreed with Mr. Hill and his associates to retire the preferred stock. On this subject Mr. Hill testified as follows:

"Q. But what I mean is, after, say May 9, was there any definite plan between you and your associates and J. Pierpont Morgan & Co. with reference to the retirement of the preferred stock?

A. Previous to May 9. I think that between May 1 and the time they made up their minds to buy the control of the common that it was decided to exercise that privilege.

Q. And that was decided upon between you and your associates and J. Pierpont Morgan & Co.?

A. No; they simply said that that could be done, and they would do it. They wouldn't hand over control of the property. Mr. Morgan had a good deal of feeling that the Northern Pacific had been a difficult property to keep on its feet and get it on its feet. His name was connected with it, and he had a good deal of pride in not handing it over to a rival.

Q. When you speak of a rival, do you mean the Union Pacific interests?

A. The interests of the Union Pacific.

Q. And the matter then was definitely de-

termined upon that you had a right to retire the preferred stock?

A. That the Northern Pacific had.

Q. Of course you mean the company had a right to retire the preferred stock?

A. Yes, sir.

Q. And having a complete majority of the common stock that would give you and your associates and Mr. Morgan and his associates complete control of the Northern Pacific?

A. Of the Northern Pacific through a majority of the common stock.

Q. Yes; that is what I mean.

A. And the Great Northern had a very direct interest in knowing that it was not—that the control of the Northern Pacific was not—going to be vested in the friends of the Union Pacific, because if that was the case the Northern Pacific owning one-half the control of the Burlington, with the control of the Northern Pacific in the hands of the Union Pacific, the Great Northern would have had to go into the hands of the Union Pacific.

Q. Now, Mr. Hill, when subsequent to this determination to retire the preferred stock was it definitely decided upon to retire?

A. Oh, before myself and friends would agree to hold our Northern Pacific we had the promise of Messrs. Morgan & Co. that the preferred stock would be retired.

Q. And that was shortly before May 9?

A. Yes, sir.

Q. And propably before May 1, was it not, Mr. Hill?

A. No, sir.

Q. Between May 1 and May 9?

A. Between May 1 and May 9. It was between the time that Kuhn, Loeb & Co. interests attempted purchasing the Northern Pacific stock in a large way, or claiming control of it, and the time that Morgan & Co. bought." (See folios 384 to 389 of the record).

This preferred stock was to be retired on Jan. 1st, 1902; that being the earliest date on which it could be retired. The plan of retirement is fully set forth in the resolution of the Northern Pacific Railway Co. relating thereto and which appears at folio 3504 et seq of the record.

An examination of this resolution shows that the plan contemplated converting the preferred into common stock, leaving the total capitalization of the Northern Pacific Railway Company at $155,000,000 of common stock; and that only holders of common stock at the date of the adoption of the resolution were entitled to subscribe for and obtain the common stock which was to take the place of the preferred. This plan when carried out would leave the control of the Northern Pacific Railway Company with J. P. Morgan and his associates, holders of the common stock on and after May 9th, 1901. This plan was finally carried out and the preferred stock retired in accordance with the provisions of the resolution above referred to. The plan of retirement was agreed upon during the summer or early fall of 1901 and prior to the time of the organization of the Northern Securities Company. The annual meeting of the Northern Pacific Railway Company, under the by-laws of the company, was to be held in October, 1901. At this meeting the preferred stock was entitled to vote for the election of a Board of Directors and in order to prevent the election of a Board by the Union Pacific interests which might be hostile to the plan of retiring the preferred stock in the manner above re-

ferred to, it was decided if necessary, to amend the by-laws by the then existing Board of Directors composed largely of Morgan's associates and friends so as to postpone the holding of that meeting, until the preferred stock was retired.

On this subject Mr. Hill testified (Fol. 536, et seq., of the record) as follows:

"Q. Now, you were aware that the stock could not be retired; that is, there could be no compulsory retirement until the 1st of January, 1902?

A. That is correct; that is the date fixed.

Q. And I suppose you were aware that at the annual meeting which was to take place in October, of the stockholders, that at that annual meeting Mr. Harriman and his associates would have a majority of the common and preferred stock; that is, if they presented it and voted it?

A. If they presented it and voted it, and the meeting was held in October. The meeting date was a matter of the by-laws, which might be changed and amended at any time.

Q. That is just what I am getting at. At that time, Mr. Hill, you had in mind, if necessary, to postpone the annual meeting of the stockholders beyond January 1, did you not?

A. It might have been done.

Q. I want to know, Mr. Hill, if, as a matter of fact, you had that in mind at the time that it could be done?

A. It had occurred, and was discussed.

* * *

Q. What I want to get at is, did you have in mind some time the last of May or first of June, whatever time it was you got home or consulted with your counsel—did you have in mind the possibility of the Harriman interests dominating the election or controlling the election of the board of directors at the next annual meeting, did you not?

A. Certainly.

Q. And you did have in mind, and you were advised by your counsel, that if that should be done the directors so named would have the power to annul or cancel any action looking to the retirement of the Northern Pacific preferred which might be taken by the then board of directors?

A. They might have attempted to annul it.

Q. I don't care so much about the law of the case as I do what was in your mind and what was called to your attention. I ask you now if the possibility of such action was not present in your mind at that time?

A. It was called to my attention and was present during the summer, I suppose. It was a subject I thought very frequently of."

Mr. Hill's knowledge of the plan for retiring the preferred stock, and then under discussion by Mr. Hill with J. P. Morgan and other stockholders of both the Great Northern and Northern Pacific Railway Company is found at folios 384 to 535 inclusive, of the record. This testimony shows that the understanding and agreement between Mr. Hill and Mr. Morgan was that the preferred stock of the Northern Pacific Railway Company should be retired January 1st, 1902, so that the control of that company would be with Mr. Morgan and his associates; and that a controlling amount of the stock of the Northern Pacific Railway Company would be turned over to the Northern Securities Company when organized, so as to transfer the control of the Northern Pacific Railway Company to the Northern Securities Company; and that Mr. Hill and his associate stockholders of the Great Northern Railway Company would also turn their Great Northern stock holdings over to the North-

ern Securities Company, when organized, for the same purpose.

On November 13th, 1901, the defendant, the Northern Securities Company, was organized by certain of the stockholders of the Great Northern and Northern Pacific Railway Companies respectively under the laws, and in the State of New Jersay, with a capitalization of $400,000,000.00 par value, and very shortly thereafter acquired about $153,000,000.00 out of $155,000,000.00 of the capital stock of the Northern Pacific Railway Company and about $100,000,000.00 out of $123,889,400.00 of the capital stock of the Great Northern Railway Company.

A large portion and much more than a majority of the Northern Pacific stock was acquired on or before November 20th, 1901, at which time very little of the Great Northern stock had been acquired by the Northern Securities Company. Substantially all of the Great Northern, as well as the Northern Pacific stock so acquired was obtained by the Northern Securities Company in exchange for the stock of the last named Company on the basis of $115.00 of the Northern Securities Company's stock for each $100.00 par value of the Northern Pacific stock acquired and $180 of Northern Securities stock for each $100.00 par value of Great Northern stock acquired.

Thus the absolute control of both the Great Northern and Northern Pacific Railway Companies was vested in the Northern Securities Company, prior to Jan. 1st, 1902.

Mr. Hill, president of the Great Northern Railway Company, was elected president of the Northern Securities Company and made chairman of its executive committee, the majority of whom were Hill's former associate stockholders in the Great Northern Railway Company, who had been active in the formation of and had turned their stockholdings over to the Northern Securities Company.

The basis on which the stock of the two railway companies was to be exchanged for Northern Securities stock was fixed by Mr. Hill in July, 1901, five months prior to the organization of the Northern Securities Company (See Fol. 472 of the record).

The Northern Securities Company was actually organized on November 13th, 1901, by three clerks selected by Mr. Hill and Mr. Morgan, and on that day held the first meeting of the Board of Directors of the Northern Securities Company, consisting of these three persons, and adopted the following resolution:

> "Resolved, that the president be and he hereby is authorized, for and in behalf of this company, to purchase any shares of the common capital stock of the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, that shall be tendered to this company at a price not exceeding $115 for each share of such capital stock of the par value of $100, such price to be payable in the fully paid up shares of the capital stock of this company, at par, the board of directors having adjudged and determined, and hereby adjudging and determining, that the value of such shares of the capital stock of the

Northern Pacific Railway Company is at least $115 per share." (See Fol. 1140 of the record).

On the following day, November 14th, the same Board of Directors again met and adopted the following resolution:

"Resolved, that the president be, and hereby he is, authorized, for and in behalf of this company, to purchase any shares of the preferred capital stock of the Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota, that shall be tendered to this company at a price not exceeding $180 for each share of such capital stock of the par value of $100, such price to be payable in the fully paid up shares of the capital stock of this company at par, the board of directors having adjudged and determined, and hereby adjudging and determining, that the value of such shares of the capital stock of the Great Northern Railway Company is at least $180 per share.

"Resolved, that the proper officers of the company be, and hereby they are, authorized and directed from time to time to make, execute and deliver proper certificates for the fully paid up shares of the capital stock of this company, in payment for any stock of the Great Northern Railway Company acquired pursuant to the foregoing resolution, at the price therein stated." (See Fols. 1285-1286 of the record).

Following the passage of this resolution, and at the same meeting, the Board of Directors was increased to fifteen, these three young men resigning, and some of the active promoters of the Northern Securities Company being elected in their place. Up to this time, there had been no president or exe-

cutive committee of the Northern Securities Company.

On November 15th, after the Board of Directors had been increased to fifteen, the following resolution was adopted, relating to the acquisition of the Northern Pacific stock owned by the Union Pacific interests:

> "Resolved, that the president be and hereby he is, authorized in behalf of this company to purchase said stock, namely, ... par value of the common stock, and ..... par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of ....., payable as to ..... thereof in fully paid-up and non-assessable shares of the capital stock of this company at par, and as to ..... in cash, and that the officers of this company be and hereby they are authorized to issue fully paid up and non-assessable shares of stock of this company to the amount of ....., and to pay..... in cash in consideration of such ..... of the common stock and ..... of the preferred stock of the Northern Pacific Railway Company."

The amounts were filled in by the Secretary of the Company two or three days later. As to the form of this resolution and the method of adopting it, see Fols. 1365 to 1367, and 1127 to 1136 of the record.

The preferred stock so acquired from Harriman and Pearce was afterwards converted into common stock in accordance with the resolution for the retirement of the preferred stock already referred to, and the absolute control of both the Great Northern and the Northern Pacific Railway Com-

panies vested in the Northern Securities Company, as already stated prior to Jan. 1st, 1902.

On January 23rd, 1902, a joint circular letter was issued by the Freight Agents of the Great Northern and Northern Pacific Railway Companies, wherein the equalizing or competitive rate between all junction points along the lines of said railroads within the State of Minnesota was withdrawn, and agents at such points were directed to ship freight received at one junction point and destined for another junction point along the lines of the Great Northern and Northern Pacific Railway Companies within the State of Minnesota, via the shorter route, and stating to such agents that "*the longer line will not undertake to equalize the rates based on the shorter mileage of the other.*" (See Fols. 3592-3595 of the record).

The effect of this joint circular letter was to withdraw all competition for business between said railroads within the State of Minesota, and to compel the shipper to ship freight via the road having the shorter route, or else pay to the road having the longer route a greater freight rate; and not only was all competition, so far as rates were concerned, withdrawn or destroyed, but all effort to secure business and all the benefits resulting therefrom to shippers on the line of said railroads within the State of Minnesota, were absolutely destroyed; spur tracks and sidings, which had been constructed in order to obtain competitive business, and give conveniences and facilities to shippers on the Great Northern line, who might otherwise ship via the

Northern Pacific, were abandoned and removed and shippers were left to get their grain and products to the Railway Company as best they could; and when complaint was made by shippers to the Great Northern Railway Company's agents, accompanied with threats to transfer their business to the Northern Pacific unless these conveniences were restored, they were informed that it made no difference to the Great Northern whether it or the Northern Pacific got the business. It amounted to the same thing. This is shown by the undisputed testimony of various witnesses found at folios 2697 to 2916 inclusive, of the record.

On March 27th, 1902, another joint circular letter was issued withdrawing the previous orders, and re-establishing the competitive rates (See Fols. 3596 to 3601 of the record.

Between these dates and on March 10th, 1902, the Attorney General of the United States filed a bill against the Northern Securities Company, the Great Northern and Northern Pacific Railway Companies, to enjoin the consolidation of the two railway companies through and in the Northern Securities Company; and also between those dates the State of Minnesota, through the Governor and the Attorney General, had announced its intention to bring similar proceedings and the State filed its bill very shortly after March 27th, 1902.

The foregoing are some of the material and undisputed facts in this case, and form, among others, the basis on which the State has proceeded in this action.

The testimony of George F. Baker, Samuel Thorne and D. Willis James, together with the joint circular letters issued by the General Freight Agents of the Great Northern and Northern Pacific Railway Companies, withdrawing all competitive rates between junction points in the State of Minnesota, and other testimony showing that all competition in both rates and traffic had been withdrawn since the consolidation of these two railway companies in the Northern Securities Company, does not appear in the Federal case.

III.

ARGUMENT ON THE FACTS.

THE LINES OF THE GREAT NORTHERN AND NORTHERN PACIFIC RAILWAY COMPANIES ARE BOTH PARALLEL AND COMPETING THROUGHOUT NEARLY ALL THE TERRITORY TRAVERSED BY THEM WITHIN THE STATE OF MINNESOTA.

On this subject, Mr. Mellen, President of the Northern Pacific Railway Company, testified at Folio 2320 et seq., of the record as follows:

> "Q. The general direction of your main lines westward is through the States of Minnesota, North Dakota, Montana, Idaho and Washington?
>
> A. That is the general course.
>
> Q. Are those lines of the Northern Pacific and the lines of the Great Northern, for a large part of the territory through which they run and to many of the points which they reach, parallel and competing lines?
>
> A. They are.
>
> Q. And with reference to the State of Minnesota, Mr. Mellen, are not the Northern Pacific and the Great Northern lines almost generally parallel and competing lines?
>
> Mr. Kellogg: Do you mean all the lines?
>
> Mr. Lancaster: Practically all of them.
>
> A. Many of the lines are parallel and competing."

The fact that said lines are parallel and competing is conclusively shown by an examination of complainant's Exhibit number 9 at page 800, of the record, and complainant's Exhibit number 14, found at page 814, of the record.

This Court in the case of *Pearsal v. The Great Northern Railway Company*, 161 *U. S.* 670, decided that these lines were both parallel and competing within the State of Minnesota.

IV.

THE NORTHERN SECURITIES COMPANY WAS ORGANIZED SOLELY FOR THE PURPOSE OF CONSOLIDATING, AND UNIFYING THE CONTROL OF, THE GREAT NORTHERN AND NORTHERN PACIFIC RAILWAY COMPANIES, AND AS A MEANS OF EVADING THE LAWS OF THE STATE OF MINNESOTA PROHIBITING SUCH CONSOLIDATION.

The judicial history of the Great Northern and Northern Pacific Railway Companies discloses, among other things, that in 1895-6, effort was made by Mr. Hill and certain other stockholders of the Great Northern Railway Company, referred to in the testimony as Mr. Hill's associates, to consolidate the Northern Pacific Railway Company with the Great Northern Railway Company, by certain of the stockholders of the latter company acquiring a majority of the stock of the Northern Pacific Company. Mr. Pearsal, who was then a stockholder of the Great Northern Railway Company, instituted proceedings against that company to prevent such consolidation. This case finally reached this court, and it was decided that such attempted consolidation was in violation of the laws of the State of Minnesota. This is the case of *Pearsal v. the Great Northern Railway Company*, 161 U. S. 671.

From the time that case was decided down to

the organization of the Northern Securities Company, Mr. Hill and certain other stockholders of the Great Northern Railway Company, referred to in the testimony as Mr. Hill's associates, state they contemplated forming a holding company for the Great Northern Railway Company, but nothing was done in this matter until they were able to secure the control of the Northern Pacific Railway Company, when energetic and active work was began toward the organization of such a holding company.

Mr. Clough, then vice president of the Great Northern Railway Co., testified that during the summer and fall of 1901, both he and Mr. Grover, its general counsel, spent a great deal of time investigating charters of the State of Minnesota

"*that would be legislative contracts with the State of Minnesota, so that they would be beyond the power of amendments;*" (See Fol. 823 of the record).

and also that he and Mr. Grover spent much time in examining the laws of New York and New Jersey to find in which state a corporation could be most safely organized with powers sufficiently broad to give them all the rights they desired to exercise over the property of the Great Northern and Northern Pacific Railway Companies through the holding company.

After spending the summer and fall of 1901 on this matter and talking it over with Hill and his said associate stockholders of the Great Northern Railway Company, as well as certain stockholders of the Northern Pacific Railway Company, including a member of the firm of J. P. Morgan & Co., it was

decided to incorporate a holding company under the laws of New Jersey. As to the purpose and object of forming such a corporation, the parties who were directly interested in its organization and with whom Mr. Hill and Mr. Clough consulted during the time the charter was being drafted and the place of incubation decided upon, testified as follows:

GEO. F. BAKER.

Mr. Baker stated that he had been one of the stockholders of the Great Northern Railway Company for many years and formed one of the associates of Mr. Hill in that company who had always co-operated with him for the purpose of controlling the Great Northern Railway Company.

"Q. You mean between that time and the time it was actually formed, you had several talks with Mr. Hill about it?

A. Yes, sir. * * *

Q. Well, what was the nature of these conversations you had with Mr. Hill?

A. They were quite general in their way. We had been through an experience in the spring there—

Q. The May 9th affair you refer to?

A. Yes, when one of the Southern railway companies, the Union Pacific especially, was trying to get hold of our property, as we thought, and would turn the business from the Northwest to California. * * * Well, we felt we didn't want to have the Northern Pacific go into the hands of parties adverse to our interests.

Q. That is, you wanted the Northern Pacific and Great Northern stocks placed with some company where the control would remain permanently? That is what you had in mind?

A. We hoped so, sir.

Q. And that was one of the purposes that you and Mr. Hill talked over in forming this Northern Securities Company?

A. I presume so.

Q. That is, you and Mr. Hill and his other associates making up this coterie of Great Northern stockholders and also the holders of a majority of the common stock of the Northern Pacific, desired to have that stock placed where it could not be raided?

A. Yes, sir.

Q. And thus fix the control of those two companies in one spot, where you gentlemen would know where it was?

A. Yes, sir.

Q. Did Mr. Hill say that, in his judgment, that purpose could be accomplished by the formation of this Northern Securities Company?

A. I can't remember that he ever said so.

Q. Well, that is what you expected, of course?

A. Yes, sir.

Q. Both you and Mr. Hill and your other associates?

A. I am speaking for myself.

Q. That was your understanding of it?

A. Yes, sir.

Q. You consented to the formation of such a company?

A. Well, I made no objection.

Q. Did Mr. Hill tell you about how much stock would be turned in, as far as the Great Northern Company was concerned?

A. No, sir.

Q. You and Mr. Hill and the other gentlemen making up this coterie of Great Northern stockholders were all desirous during this time of keeping this stockholding in the Great Northern permanently in one place?

A. Yes, sir.

Q. What was your desire in doing that?

Why did you wish it?

A. Principally that some of us—some of them—were getting old, and we thought it was desirable to keep the thing together; we had talked of that for several years.

Q. That is, you wanted to fix the control of the Great Northern through a stockholding in the Northern Securities Company?

A. Yes, sir.

Q. And this coterie of stockholders had always been able to control the Great Northern Railway Company?

A. We had.

Q. And you expected when you transferred those holdings of the Great Northern Railway Company to the Northern Securities Company that the corporation would be able perpetually to control the Great Northern Railway Company by that stockholding? That was your expectation?

A. Well, that would depend on whether it was all put in or not.

Q. Yes, but that was your expectation?

A. That is what we hoped for; yes, sir.

Q. And that is what you hoped for when you were discussing the advisability of forming this Northern Securities Company?

A. Well, we discussed that very little, as far as I was concerned.

Q. Well, that is what you had in mind.

A. Yes, sir.

Q. That was the purpose of the formation of this company—the Northern Securities Company?

A. Well, I can't say what was the purpose of the men that got it up; they were more instrumental in it than I was.

Q. As far as you were concerned that was your purpose and you understood that to be their purpose?

A. Yes, sir.

Q. And also to control the Northern Pacific, of course, through this majority of the common stock?

A. Yes, sir. * * *

Q. And you understood those to be the purposes of Mr. Hill, did you not?

A. Practically, yes.

Q. And you got that from your conversation with him, of course?

A. Practically; yes, sir." (See Folios 1612 to 1624 and folio 1638 of the record).

Again on re-direct examination on this same subject, Mr. Baker testified, at folios 1662-3 of the record as follows:

"Q. Well, leaving out the basis of exchange, then, you knew prior to the time that the Northern Securities Company was formed that such a company was to be formed for the purpose of taking over the stock of both the Great Northern and Northern Pacific in order to effect this control that you have spoken about?

A. Yes, sir.

Q. Now, Mr. Baker, you say that one reason you had for exchanging your stock was that you thought it would make your stock more valuable. What additional value could be given to your stock by exchanging it for the Northern Securities Company stock?

A. Perhaps I should have expressed that better by saying I hoped it would keep it from being depreciated in value.

Q. That is, you thought by the organization of the Northern Securities Company and the taking over of the stock of both the Great Northern and Northern Pacific by that company, that the permanent control of those two corporations would be fixed in one place?

A. If it would prevent it going into the hands of the other companies that were seeking to control it, it would be more valuable than if we should lose control of the property.

Q. That is, then, you had in mind that by fixing the ownership of Great Northern and Northern Pacific stock in one holding com-

pany, you would thus permanently fix the control of those two companies so that they could not be assailed by any outside influence?

A. Yes, sir.

Q. That was what you understood to be the purpose?

A. In a general way, yes.

Q. And you thought that was a desirable thing to do?

A. Yes, sir."

SAMUEL THORNE.

On this same subject, Mr. Thorne testified, at folios 1689 to 1746 inclusive, of the record as follows:

"A. I had talked to Mr. Hill about the organization of this company, but nothing as to the name.

Q. Your talks were more to the purposes and objects of the corporation, rather than the name of it?

A. Yes.

Q. Now, was one of the purposes which you discussed with Mr. Hill the holding of the stock of the Great Northern Railway, which you and Mr. Hill and the other gentlemen making up this coterie had held for some time prior to that?

A. Well, yes.

Q. Did you also talk about holding the stock of the Northern Pacific in this same company?

A. Not in the beginning; I did not, sir.

Q. Well, I don't care about the beginning, but during the year 1901?

A. Yes, during the year 1901 I did.

Q. That is, you talked to Mr. Hill during the year 1901 about organizing a corporation which should hold the Northern Pacific stock and the Great Northern stock?

A. Yes.

Q. Why were you desirous of forming a corporation to hold the stock of these two railway companies?

A. Well, as I told you, my interest was in the Great Northern Railway Company; my interest was not in the Northern Pacific.

Q. But you had acquired some interest in the Northern Pacific?

Witness: My object was to protect the interests which I held in the Great Northern.

Q. That is, your object in forming the Northern Securities Company was to protect the interests which you had in the Great Northern?

A. Yes.

Q. Was anything said during these talks with Mr. Hill about your interests in the Great Northern being more secure and better protected provided the Northern Pacific common stock was turned over to this holding company?

A. I don't remember having any talk with Mr. Hill about it at all until after the effort was made to get control of the Northern Pacific stock.

Q. Let me state, Mr. Thorne, that in the questions I ask now I am confining myself to the year 1901; not prior to that time.

A. Yes, sir. * * *

Q. How did you come to be talking to Mr. Hill, then, about this holding company, or the company which was to be formed, acquiring the stock of the Northern Pacific? What was said in that connection? What led up to it?

A. *Well, of course, it became self-evident to me that it was to the interest of the Great Northern Company that the Northern Pacific stock should be put in such condition that it could not be used against the interests of the Great Northern Company.*

Q. That is, the stock of the Northern Pacific should be put so that it could not be used

against the interests of the Great Northern Company?

A. Yes.

Q. That is, in these talks it was stated by Mr. Hill and yourself that it would be for the interests of the Great Northern Railway Company to have the ownership—

A. (Interrupting). I don't think we ever discussed it. It was self-evident to me. I don't think we ever discussed that question at all.

Q. The parties, then, who had in view the formation of the Northern Securities Company, including yourself, were of the belief that it was for your interests—

A. (Interrupting). That was my belief. I don't know about the others.

Q. Your belief, then, was—in the part that you took in the formation of the Northern Securities Company—that it was for your interests as a stockholder of the Great Northern Railway Company that the control of the stock of the Northern Pacific should be placed where it would be permanently fixed, so that it could not be used against the Great Northern?

A. Yes.

Q. You knew, did you not, when you were having these talks with Mr. Hill, that Mr. Morgan and his associates owned a majority of the common stock of the Northern Pacific?

A. I knew it after it was known by everybody; I didn't know it before.

Q. You knew during the summer of 1901 that such was the fact?

A. Yes, I knew it was said to be the fact. I didn't know it of my own knowledge. Mr. Morgan had not told me so.

Q. And you also knew that it took the holdings of Mr. Hill and yourself and some other stockholders of the Great Northern Railway Company to make up the majority of the common stock of the Northern Pacific?

A. Ask that again, please.

Q. You knew, Mr. Thorne, at this time that

it took the holdings of Mr. Hill and yourself and your associates in the Northern Pacific stock to make up a majority of that stock, together with those of Mr. Morgan.

A. That is what I supposed.

Q. Now, Mr. Thorne, did Mr. Hill tell you in any of these talks that he had with you in the summer of 1904 regarding the formation of the Northern Securities Company, that Mr. Morgan and his associates would turn their holdings of Northern Pacific common stock into this Northern Securities Company?

A. I can't recall whether he did or not, sir. I don't know.

Q. Well, you say you were desirous of having the Northern Pacific stock, at least, fixed in some holding company?

A. Yes.

Q. Now, didn't Mr. Hill tell you that—

A. (Interrupting). Possibly he may, but I don't remember.

Q. Then how did you know that that would be accomplished by the organization of the Northern Securities Company?

A. I didn't know it. I took for granted it would be. Of course, it was to their interest to do it.

Q. Then, it was generally understood between you and your associate holders of Great Northern stock that by the formation of the Northern Securities Company the control of the Northern Pacific would be placed in the manner you have indicated?

Mr. Clough: What do you mean by "generally understood?"

Witness: Well, I was going to ask what you meant by "generally understood." I can only answer for myself. I never had any talks with any other gentlemen as to whether they were going to put their stock in or were not going to put their stock in.

Q. How did you come to assume it would be done?

A. Because it was so evident on its face.

Q. Mr. Thorne, didn't you talk with Mr. John S. Kennedy about it?

A. Oh, yes; I talked to Mr. Kennedy; I talked to several of the people—Mr. James.

Q. Did you talk to Mr. James about it?

A. I did, sir.

Q. Did you talk with Col. Clough about it?

A. I think very possibly so.

Q. Did you talk with Mr. Baker about it?

A. I think that is probable, too.

Q. Did they all express the same belief regarding this matter that you entertained?

A. I should think they did; I think they were all of the same mind.

Q. Therefore, you did know that these other gentlemen—

A. (Interrupting). I only knew we all thought it would be for our interests.

Q. When you say "for our interests," you mean as stockholders of the Great Northern?

A. Yes, I mean our individual interests as stockholders of the Great Northern Railway Company.

Q. Then, to sum it all up, Mr. Thorne, the purpose you had in mind in consenting to turn your stock in to the Northern Securities Company—your stock in both the Great Northern and the Northern Pacific was to fix the control of the Northern Pacific in a permanent way so that it could never be used to assail your interests in the Great Northern?

A. In taking the Northern Securities Company stock my interest was in both of the companies.

Q. Yes, but you have testified that your interests were largely with the Great Northern.

A. Yes, they were—more largely with the Great Northern than with the Northern Pacific.

Q. And it was that interest and ownership that you desired to protect?

A. *Yes. But when I became a shareholder in the Northern Securities Company then of*

course I recognized the fact that it would be for the interest of both of those properties to be together, where they would not antagonize one another to their harm.

Q. You mean, then, that it was for the interests of the stockholders of both companies that the stock of those two companies should be held by one corporation, so they would not antagonize one another?

A. So no person could get possession of the one to antagonize the other.

D. WILLIS JAMES.

On this same subject Mr. James testified at folios 1750 to 1754 of the record, as follows:

"Q. Now, with whom did you talk besides Mr. Clough regarding the formation of the Northern Securities Company?

A. You mean in 1901?

Q. Yes.

A. With no one. Possibly once with Mr. Hill, but I cannot swear to that, I can't be sure that I did. Mr. Kennedy was away and I had no conversation with any one except Col. Clough until after I met Mr. Kennedy some time late in the summer, probably in August or the end of July, at Bar Harbor.

Q. Did you talk with him then about it?

A. I had some conversation with him about it; yes, sir.

Q. What talk did you have with him about it?

A. Only to the extent that he had had some conversation of importance soon after the raid of the 9th of May; that some holding company or something of that character, should be organized to carry out the designs or the plans we had had for so many years past, and it seemed to be—

Q. What plans or designs do you refer to?

A. Having some company or some way—trust company or some other way—by which

these gentlemen that you have referred to should hold their stock together, in case of death or other emergency.

Q. Why did you desire to keep that stock together, Mr. James?

A. Because as I said before, sir; we thought that it was for the interests of the company, the interests of the territory that was served by it, *and our own personal interests.*

Q. Were you afraid, after the raid of May 9th, that some other company or some other set of people might come in and attempt to buy a controlling interest in the Great Northern Railway Company?

A. Of course, the raid that was made upon the Northern Pacific at that time did indicate and show that it was within the possibilities that a raid could be made on the Great Northern.

Q. And you desired to have your interests united in such a way that you could always co-operate in opposition to any such plan?

A. Yes, sir."

And again at folio 1759 of the record, Mr. James stated:

"Q. And you understood the plan to be to turn in the holdings of these gentlemen in the Northern Pacific, including Mr. Morgan?

A. Yes, sir.

Q. Into this Northern Securities Company?

A. Yes.

Q. That would give the Northern Securities Company a majority of the common stock of the Northern Pacific?

A. Yes, sir.

Q. And you gentlemen were to turn in the holdings that you had in the Great Northern Railway Company?

A. Yes, sir.

Q. And I suppose the company was to acquire such other Great Northern stock as the

stockholders saw fit to surrender.

A. That was afterwards discussed and it was considered that it was fair and right to offer it to the other stockholders, because the Great Northern Railroad had never had any inside rings of any kind.

Q. Now, Mr. James, when was the understanding reached that you gentlemen should turn in all of your Northern Pacific common stock (which was a majority) and such Great Northern stock as yourself and Mr. Hill and his friends and associates (forming the coterie you have referred to) held?

A. I can't fix the date. I should think it was probably the end of October or early in November.

Q. That was prior to the time the Northern Securities was actually organized, of course?

A. I don't know the date when the Northern Securities Company was organized.

Q. It was organized November 13, 1901.

A. I didn't know that.

Q. So that before the Northern Securities Company was actually organized as a corporation, it had been agreed between you and Mr. Hill and Mr. Kennedy and the other gentlemen forming the coterie who held about 35 millions of the Great Northern stock, and yourselves and Mr. Morgan and the other holders of the 42 millions of Northern Pacific stock, that that should all be turned in to the Northern Securities Company when organized?

A. Yes, sir."

J. S. KENNEDY.

Mr. Kennedy testified on this subject, at folio 1461 of the record, as follows:

Q. It was the expectation and purpose of you gentlemen at that time, when you conceived the idea of organizing the Northern Securities Company, to acquire the stocks of

both roads. I say it was your expectation and intention and purpose to have the new Securities Company acquire a majority of the stocks of both roads, the Great Northern and the Northern Pacific, was it not?

A. It was our intention to have a majority of the Northern Pacific, but as to the Great Northern, it was simply an intention to let the members in who chose to come in, and it remained to be seen whether it would be a majority or minority.

Q. Why did you plan on getting a majority of the Northern Pacific and not of the Great Northern, Mr. Kennedy?

A. Well, my idea was in consequence of what took place last May; we didn't want to be subjected to such an attack as took place last year.

Q. You wanted to have a majority of the stock of the Northern Pacific where you could absolutely control it?

A. Yes, sir.

Q. Under all circumstances?

A. Under all circumstances.

Q. And so far as the Great Northern road was concerned it was regarded as practically certain to all intents and purposes that Mr. Hill, yourself, J. Pierpont Morgan and George F. Baker controlled the Great Northern?

A. I don't remember anything of the kind ever coming up.

Q. Weren't you equally anxious to prevent the possibility of such an occurrence with reference to the Great Northern?

A. I think those who were called Mr. Hill's associates had enough stock to prevent anything of that kind.

Q. That is what I am getting at, so that when you planned absolutely to hold a majority of the Northern Pacific and have that turned into the securities company and to turn in the stock of yourself and Mr. Hill's associates in the Great Northern, you knew that you were

controlling enough stock of the Great Northern so it could not be purchased by a rival interest?

A. I don't know that absolutely.

Q. You felt pretty certain of it?

A. I thought it was probable.

Q. You were just as anxious to prevent an attempt to buy up a majority of the Great Northern by a rival interest as you were to prevent an attempt to buy up a majority of the Northern Pacific, weren't you?

A. I didn't want an attack in either case.

Q. That is what I am getting at—that is, a purchase by a rival interest of a majority of the stock of either the Great Northern or the Northern Pacific was a thing which you were trying to prevent, was it not?

A. Yes, sir; that was our idea; at least, that was my idea. I speak for myself."

J. P. MORGAN.

Mr. Morgan talked with Mr. Hill about forming the Northern Securities Company and at folio 2189 of the record, states the result of that conversation.

"Q. What was the result of your talk with Mr. Hill?

A. The result of it was that we decided that the Northern Pacific, so far as I was concerned as a stockholder in the Northern Pacific, I would put my stock in provided that he would take everybody else's into this thing that he had proposed to arrange for the Great Northern.

Q. That is this Northern Securities Company?

A. Yes.

Q. That is, provided he would go in himself?

A. Yes, of course. Well, I didn't care whether he went in or not. We had a majority without him. I wanted a majority of the Northern Pacific stock in that securities com-

pany; I didn't care who went in, provided there was enough there to protect the Northern Pacific."

J. J. HILL.

Mr. Hill testified regarding this matter at folio 457 et seq. of the record as follows:

"Q. What steps, if any, have been taken by you and your associates and Mr. Morgan and his associates with reference to the organization of the Northern Securities Company prior to November 13th, 1901?

A. The Northern Securities Company or a company of that character, has been considered by the large shareholders of the Great Northern Railway Company for several years.

Q. And for what purpose, Mr. Hill?

A. For the purpose of combining their interest in the property.

Q. And what was the object or purpose of the combination?

A. Some of them were very old men and they had always acted together and in harmony, and they desired to perpetuate that action.

Q. What amount of stock, par value, of the Great Northern road did those men that you now speak of hold prior to November 13, 1901, in the Great Northern road?

A. Oh, I don't think there was any material change in their holding for a long time. I could not say about November 13.

Q. About.

A. On the 1st of November I should say they held somewhere from thirty-three to thirty-five millions.

Q. And were you among the number?

A. Yes, sir.

Q. And was that the purpose and object, Mr. Hill, of your organizing the Northern Securities Company?

A. That was the purpose.

Q. And at the time of the organization of the Northern Securities Company were these things that you have told us the only objects or purposes that you had in mind at that time?

A. The action in buying the majority of the stock of the Northern Pacific in the market in April or May, or both, brought the question up more strongly than before as to the necessity of the Great Northern old shareholders who had been continuously connected with the property from the beginning, making their holding together permanent; and, I think, in June, somewhere about the 5th or 6th of June, speaking from recollection, Mr. Kennedy, on his return from Europe discussed the matter with me going over the entire situation, the relations of the Burlington; the relations growing out of the large purchases by the Union Pacific interests of the Northern Pacific, and suggested whether we should not include in our holding company our holdings in the Northern Pacific.

Q.—And for the same purpose?

A. For the same purpose, so that we would all act together and no one would sell out or leave the others. We would all act together.

Q. For the purpose of unifying the interests that you had in the two roads?

A. Yes, sir; for the purpose of unifying the interests in each road; because when the Burlington was transferred or sold to the Northern Pacific and the Great Northern jointly, our owning an equal share in the company, it was a matter of great consequence to the Great Northern as to who would own the stock of the Northern Pacific or control the Northern Pacific, and some of our shareholders—some of them are 86 years old, others are more than 80 and so on—they might have concluded that they would sell their stock, and it might have made a difference as to the majority of the common stock."

From the foregoing testimony it is clear that the controlling stockholders of the Great Northern Railway Company, including Mr. Hill; and the controlling stockholders of the Northern Pacific Company, including Mr. Morgan, agreed during the summer and fall of 1901 to organize the Northern Securities Company, for the purpose of turning over to that company the absolute control of both railway companies and thus to place the property of the two railway companies under a single or unified management, and to prevent either company doing any act hostile to the interests of the other, or entering into competition with the other, so as to lower rates or solicit business; in other words, to as effectively stifle competition and destroy whatever benefit might result therefrom to the public, as though the entire system of railroads of each company within the State of Minnesota were owned and controlled by a single operating railroad corporation or individual.

V.

IN ADDITION TO THE TESTIMONY AND FACTS ABOVE QUOTED AND REFERRED TO, THE CONDUCT AND ACTS OF MR. HILL AND MR. MORGAN AND THEIR ASSOCIATES, CONCLUSIVELY SHOW THAT THE PURPOSE AND OBJECT OF THE INCORPORATORS OF THE NORTHERN SECURITIES COMPANY WAS TO CONSOLIDATE AND CONTROL THE PROPERTY AND LINES OF THE GREAT NORTHERN AND NORTHERN PACIFIC RAILWAY COMPANIES.

(a) The basis of exchange of the Northern Securities stock for the Great Northern and Northern Pacific was fixed by Mr. Hill early in July, 1901, nearly five months prior to the organization of the Northern Securities Company. This basis was arbitrarily fixed by Mr. Hill and not based upon the market value of the stock of either of said Railway Companies at that time or at the time the exchange was made. Relative to fixing the basis of exchange, Mr. Hill testified at folio 471, of the record, as follows:

> "Q. Well, then, at the time you formed the Northern Securities Company, organized the Northern Securities Company, had you agreed upon the basis at which the Northern Pacific stock should be turned into the Northern Securities company in exchange for Northern Securities stock, as well as the basis on which the Northern Pacific stock should be turned in in exchange?
>
> A. My recollection of that is that possibly in my interview with Mr. Kennedy, early in June, soon after his return from Europe, that the question came up as to how, if we put our

own holdings into a company, upon what basis this stock would go in, and he asked me to turn it over. Maybe I wrote him and maybe I saw him; but I think the basis—I think, after consulting with two or three of the shareholders, I fixed the rate upon which each, the Northern Pacific and the Great Northern, would be taken or purchased by the holding company when such holding company was organized.

Q. Was that rate, Mr. Hill, that you fixed $1.15 for the Northern Pacific, and $1.80 for Great Northern?

A. That was right.

Again, at folio 482, of the record, Mr. Hill stated:

"Q. Mr. Hill, I understood you, yesterday, to say that in the matter of the basis upon which the Northern Pacific common was to be turned into the Northern Securities Company and the stock of the Great Northern, that you fixed that basis yourself. Is that correct?

A. I recollect, or as I recollect it, the figures I suggested were adopted and considered right by the parties whom I consulted.

Q. And what considerations determined $1.15 for the Northern Pacific common, Mr. Hill? What were the chief considerations which determined that amount with you and your associates?

A. The value of the property, the property taken as a whole; its capacity to earn money, its land grant, and the situation in the country, and so on.

Q. Did the market value of the stock at that particular time—

A. The stock hadn't a market quotation at the time that I suggested the figure. My recollection is that at the time that the figure was suggested or named it was midsummer.

Q. And at the time when you suggested

that figure and that was determined upon, the Northern Pacific common was practically out of the market, wasn't it?

A. I think so; not quoted.

Q. And was not being sold in the stock markets?

A. No transactions.

Q. Was the Great Northern stock being sold at the time when the $1.80 was agreed upon?

A. When that rate was named, Great Northern was selling on the market.

Q. And at what figure?

A. My recollection is about $1.95.

Q. At the time when it was agreed to put it into the Northern Securities Company at $1.80?

A. Yes, sir.

Q. And had it been selling at $1.95 for any length of time previous to that?

A. Oh, yes; it had been selling; it sold up to $2.

Q. Was $2 the highest point it had reached?

A. I don't recall the figures; possibly something over 200. I don't carry those figures in my mind.

Q. I understood you to say, Mr. Hill, that you suggested the price and it met with approval and that that was actually—

A. The approval of those with whom I consulted, and they were very few, and this was simply a stockholders' affair acting individually, and a circular was subsequently prepared after the formation of the company; but before that it was limited to a very few people, and in that connection let me say there was no agreement or formal undertaking.

Q. In that connection will you give me the names of the very few stockholders with whom you consulted and to whom you suggested the $1.15 and $1.80 as the prices of exchange?

A. I think the suggestions were mainly

confined to Mr. Kennedy, Mr. James, Mr. Thorne, Mr. Sterling and Mr. Baker. Now, it might have been suggested to some others; probably Mr. Clark.

Q. Did any of those gentlemen whose names you have given represent J. Pierpont Morgan & Co.?

A. No, sir."

This basis of exchange was fixed by Mr. Hill in June or the early part of July, 1901, nearly five months before the Northern Securities Company was organized. After the organization of the latter company, no consideration was given by it to this matter. On the very day of its organization, and before it had selected its permanent Board of Directors, or elected officers, the three clerks selected by the promoters of this scheme, passed resolutions carrying out Mr. Hill and Mr. Morgan's previous agreement on this subject. What can more conclusively show that the Northern Securities Company was organized for the purpose of consolidating these two Railway Companies and not as an investment company?

(b) The basis of exchange for the stock of the Union Pacific interests and the amount to be paid therefor was fixed by Mr. Morgan and Mr. Hill prior to the organization of the Northern Securities Company. Mr. Morgan and Mr. Hill agreed to have issued to Harriman and Pearce, representing the Union Pacific interests, $82,492,871 par value of the Northern Securities stock when organized and issued, and to have $8,915,629 paid in cash;

and two days after the organization of the Northern Securities Company, this action was reported to the Board of Directors and a resolution adopted carrying out such action (See fols. 1322 and 1129, of the record.

If the promoters of the Northern Securities Company intended only to organize an investment company, they certainly would not have paid a cash premium to the Harriman and Pearce interests of $8,915,629 over and above the amount fixed by Mr. Hill as the price at which the Northern Pacific should be exchanged for the Northern Securities Company stock. Harriman and Pearce received not only the full amount they were entitled to in the stock of the Northern Securities Company on the basis fixed by Mr. Hill for the exchange, but also that amount of cash in the way of a premium in addition. (See fols. 1128 to 1145; also Fols. 1364 to 1375, of the record).

J. P. Morgan & Co. began negotiating for the acquisition of the Harriman and Pearce holdings of Northern Pacific stock for the Northern Securities Co. about two months prior to the organization of that company. (See folios 2314 & 1964).

In this connection it is to be noted that the Northern Securities Company has never attempted to, nor has it ever purchased any other stocks or securities than those of the Northern Pacific and Great Northern Railway Companies, or the property and franchises of such companies.

(c) The amount of the stock of the Northern Securities Company stock, when organized, was fixed at $400,000,000, which was the amount necessary to be issued to obtain all of the outstanding stock of the Northern Pacific and Great Northern Railway Companies on the basis of exchange fixed by Mr. Hill prior to the organization of the Northern Securities Company.

(d) As soon as the Northern Securities Company was organized, it sent a circular letter to all of the stockholders of the Great Northern Railway Company, urging them to exchange their stock in that Company for the stock of the Northern Securities Company. (See Defendant's Exhibits "A" and "B," pages 1048-1050, of the record).

The promoters of the Northern Securities Company had an agreement with the holders of at least a majority of the common stock of the Northern Pacific Railway Company that they would exchange that stock for the stock of the Northern Securities Company as soon as organized; and also an agreement that the preferred stock of the Northern Pacific should be retired on the first day of January following, and converted into common stock, most of which would then go to the Northern Securities Company under the plan of retirement; thus giving the Northern Securities Company substantially all of the stock of the Northern Pacific Railway Company. Thus it was not necessary, nor was any circular letter sent to the stockholders of the Northern Pacific Railway Company so-

R2 To these Folios 1762, 1703-06, 1588-89

liciting the exchange of that stock. But under the arrangement and agreement, the Northern Securities Company would have a minority of the Great Northern stock, but as its promoters believed, sufficient so that they could control the Great Northern Railway Company, unless a combination was formed against them. This is shown by the testimony of Kennedy and others already quoted in this brief.

(e) If the promoters of the Northern Securities Company intended only to organize an investment company and not a corporation to consolidate and control the Great Northern and Northern Pacific Railway Companies lines and properties, why was it necessary for, and why did these promoters agree to, and thereafter retire the preferred stock of the Northern Pacific Railway Company, so as to obtain control of that company and its property and franchises? Purely as an investment company, the preferred stock of the Northern Pacific Railway Company would have been just as valuable to the Northern Securities Company as the common. In case it could not secure the preferred and common stock of the Northern Pacific owned by Harriman and Pearce, and which combined made a majority of the Northern Pacific stock, then other securities deemed equally good could have been purchased.

(f) If the Northern Securities Company was organized to act simply as an investment company, why did its promoters hesitate to place in its name a majority of the Great Northern stock, and in-

stead of taking the actual title to such stock, place 50 per cent of the stock acquired by it in the name of its clerks, as trustees for it? If, as Mr. Clough testified, this was done in order to have stock to be pledged in case of loans being made, it is remarkable that one-half of the Great Northern stock acquired by it should be so placed in the name of trustees and none of the Northern Pacific stock. Surely the Northern Pacific stock was as good collateral as the Great Northern; and it is still more remarkable that none of the Great Northern stock was so placed until the Governor of this State announced his intention to proceed against the Northen Securities Company on the ground that it intended to acquire all or a majority of the stock of both railway companies for the purpose of control.

(g) If the Northern Securities Company was organized solely as an investment company, there was no occasion for Mr. Morgan's famous definition of "community of interest." When Mr. Morgan was being examined as to his purpose in trying to get control of the Northern Pacific from the interests represented by Harriman and Pearce, in order that control of the Northern Pacific might be turned over to the holding company when organized, he testified as follows:

> "Q. Mr. Morgan, you know that the Union Pacific, of course, was a competing line with the Burlington. You know that it had attempted to wrest your property away from you; what was the object of putting their representatives on the board?
>
> A. Simply to show that there was nothing

that the Northern Pacific management, or J. P. Morgan & Co., or anybody, which had bought the Burlington, to show that they were acting under what we know as a community of interest principle, and that we were not going to have that battle on Wall street. *There was not going to be people standing up there fighting each other.*

Q. What is community of interest?

A. *The community of interests is that principle that a certain number of men who own property can do what they like with it.*

Q. But they shan't fight one another?

A. There is no fighting about it. If they choose to fight their own property—but people don't generally do that.

Q. Is not this community of interest idea one of working harmony?

A. Working in harmony—yes.

Q. Even though they own competing and parallel lines?

A. No, *they own them all.*" (See Fol. 2170 and 2171, of the record).

(h) THE LANGUAGE ADOPTED BY THE INCORPORATORS OF THE NORTHERN SECURITIES COMPANY IN THE ARTICLES OF INCORPORATION, WHEN CONSIDERED IN CONNECTION WITH THE CHARTERS AND BY-LAWS OF THE GREAT NORTHERN AND NORTHERN PACIFIC RAILWAY COMPANIES, CLEARLY SHOWS THAT THE SOLE PURPOSE OF THE NORTHERN SECURITIES COMPANY WAS TO ACQUIRE THE POWER TO ABSOLUTELY CONTROL THE TWO RAILWAY CORPORATIONS.

The charter of the Great Northern Railway Company provides that "all the affairs and business of said company shall be conducted by or under the direction of a Board of Directors, and they are au-

thorized to do all things necessary to be done." (See Appellee's Exhibit "D," page 1092, of the record).

The charter of the Northern Pacific Railway Company provides that "All the affairs of said company shall be managed by a Board of Directors, * * * who are hereby invested with all the powers of the corporation." (See Appellee's Exhibit "E," found at page 1125, of the record).

Each share of stock is entitled to one vote at any stockholders' meeting for the purpose of electing directors of said railway companies.

The by-laws of the Great Northern Railway Company provide for the appointment of an executive committee from the Board of Directors, consisting of three persons, of whom the president of the company shall be one; and this executive committee can be authorized to transact all the business of the Railway Company for and on behalf of the Board of Directors. (See Appellee's Exhibit "J," page 1183 of the record).

Substantially the same provision is made for the appointment of an executive committee and the transaction of the business of the company, in the By-Laws of the Northern Pacific Railway Company. (See page 1172, of the record).

The charter of the Northern Securities Company in stating the objects for which the corporation is formd, specifies the objects to be

"to acquire by purchase, subscription OR OTHERWISE * * * any shares of capital *stock created or issued by any other corporation*

*or corporations, association or associations of the State of New Jersey, or of any other state, territory or country * * * and while owner thereof, to exercise all the rights, powers and pririleges of ownership, including the right to vote thereon * * * and to do any acts or things designed to PROTECT, PRESERVE, IMPROVE OR ENHANCE the value of any such securities."*

It further provides, "*The Board of Directors of the corporation shall be fixed from time to time by the by-laws.*"

The charter further provides that "*The Board of Directors may appoint from the Directors of the executive committee, of which a majority shall constitute a quorum',' leaving it to the Board to fix the number of the executive committee.*

The charter further provides that "*The Board of Directors may make by-laws and from time to time alter, amend or repeal any by-law.*"

The clear purpose of the charter of the Northern Securities Company was to provide for unlimited power for the corporation, and to concentrate such power in a very limited number of persons. This is further shown by the provision in the charter which permits the Board of Directors to provide in the By-laws that less than a majority may constitute a quorum of the Board and to determine "*whether and to what extent and at what time and place and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account, book or document of the*

corporation, except as conferred by the statute of the State of New Jersey when authorized by the Board of Directors."

What more complete device could be adopted for placing the control of the corporations, the majority of whose stock is owned by the Northern Securities Company, than the one disclosed by these Articles of Incorporation? What scheme more complete, for the consolidated control of two or more railway companies, owning parallel or competing lines, could be devised, than a corporation with the unlimited powers and concentrated government provided for in these articles?

If the purpose of the Northern Securities Company was simply to act as an independent investment company and not to consolidate and control competing lines of railway, why was it necessary to spend months investigating charters of the State to obtain a legislative *contract beyond amendment*, or to find a state whose laws permitted the creation of a corporation with such unlimited powers, coupled with the authority in the incorporators to concentrate such powers in the hands of two or three men?

When these facts are considered in connection with the testimony of Mr. Baker, Mr. Thorne, Mr. James and Mr. Kennedy as to their conversations with Mr. Hill and Mr. Clough, the two men most instrumental in consummating this scheme, the conclusion seems irresistable that the sole and only purpose of the Northern Securities Company was and is to place the absolute control of the Great

Northern and Northern Pacific Railway Companies under a single head.

(i) If further proof is needed of the purpose and intent of the incorporators of the Northern Securities Company as consummated in the organization of that company, it is found in the results immediately following the acquisition by it of a majority of the stock of the two railway companies.

In less than thirty days after the Northern Securities Company had obtained a clear majority of both the Great Northern and Northern Pacific Railway Companies stocks and elected Mr. Hill, the President of the Great Northern Railway Company, President of the Northern Securities Company, and appointed an executive committee of three, of which the same Mr. Hill is Chairman, a joint circular letter was issued by the Great Northern and Northern Pacific Railway Companies, withdrawing all equalizing and competitive rates between the Northern Pacific and Great Northern Railway Companies within the State of Minnesota and elsewhere.

These joint circular letters or orders provide, among other things, the following:

> "Freight shipments from one junction point to another junction point will be forwarded via the line having the shorter mileage and lower rates. *The longer line will not undertake to equalize the rates based on the shorter mileage of the other.* * * * Any former instructions conflicting with the above are hereby cancelled." (See Exhibits 27-8-9 at folios 3592 to 3609 inclusive, of the record).

L. T. Stodder, one of the Freight Agents of the Northern Pacific, testified that these instructions withdrew all competition and required the shipper to either pay the distance or higher tariff or ship via the shorter route. (See Fols. 2745 et seq., of the record).

Not only was all competition withdrawn, so far as rates were concerned, but after January 1st, 1901, there was no competition for business between the Great Northern and Northern Pacific Companies within the State of Minnesota. This resulted in depriving shippers of many rights enjoyed prior to that time, and also in imposing many additional inconveniences to shippers along such lines.

A. J. Wright testified that this necessitated shipping his manufactured products from Moorhead when going to junction points along the Great Northern via that road, or else pay what was practically a prohibited tariff to the Northern Pacific. This resulted in delays of from two to five days on articles shipped by him to junction points on one road, unless he was willing to pay a very high freight rate over the other road. (See Fols. 2697 et seq., of the record).

Mr. O. C. Beck testified to substantially the same thing, giving the reasons why such was the case. (See Fols. 2790 et seq., of the record).

Mr. Frank A. Weld, President of the Normal School situated at Moorhead, Minn., testified that

prior to Nov. 13, 1901, sharp competition had existed between the Northern Pacific and Great Northern Railway Companies at their junction point at Moorhead, for the patronage of the State Normal School, and the use of a parlor car had been extended to students and teachers traveling in a body upon the Northern Pacific Railroad without extra charge, but since the organization of the Northern Securities Company, the patronage of the students and teachers had not been solicited or this courtesy extended. (Fols. 2761 to 2784).

Addison Leach, who is a joint owner of several thousand acres of land, the center of which is situated about two and one-half miles from the Northern Pacific and a little less than four and one-half from the Great Northern Line of railway, a short distance west of the western boundary of the State of Minnesota, testified that during the past fifteen years he has shipped annually large quantities of grain over the Great Northern railway, sometimes aggregating as high as one hundred and fifty thousand bushels in a single year. In 1887 the lessor of the Great Northern built a spur track from its station to the farm buildings of Mr. Leach situated in the center of his farm, and since that time the Great Northern Railway and its lessors continuously until Sept. 12, 1902, furnished cars to Mr. Leach for the purpose of shipment of his grain upon this spur track. Sept. 10, 1902, the first season after the organization of the Northern Securities Company twelve cars were furnished and placed upon

this spur track for Mr. Leach's use in loading and sixteen others promised for Sept. 12th. On Sept. 12, 1902, the Great Northern Railway Company refused to furnish the cars promised and took up the spur track for the full distance of four and one-half miles to the main line. It appears from the evidence of Mr. Leach that relations between him and the railway company were pleasant and no excuse furnished except business reasons required it. (See Fols. 2834 to 2959).

Mr. Weidemann testified to many inconveniences suffered after Sept. 1st, 1902. (See Fols. 2872 et seq., of the record).

The following is a statement, chronologically arranged, of the events leading up and relating to this consolidation:

(1) January 1st, 1901, J. P. Morgan dissolved the voting trust of the Northern Pacific Railway Company.

(2) During the same month (Mr. Hill says about the middle), Hill and Morgan began negotiations for the purchase of the Chicago, Burlington & Quincy Railroad Company. Folios 231–238

(3) During February, 1901, Hill and Morgan continue negotiations for the purchase of the C. B. & Q. Co.

(4) In March, 1901, Harriman, representing the Union Pacific interests, asked to be allowed to participate in the Burlington purchase, which Hill and Morgan decline to allow him to do, or to have any representation on the Board of Directors of the Northern Pacific.

(5) During the early part of April, 1901, Hill and Morgan consummate the purchase of the C. B. & Q. Company for the Great Northern and Northern Pacific Railway Companies.

No meeting of either the stockholders or the directors of the Great Northern or Northern Pacific Railway Companies had been held to authorize this.

(6) Later, and during the same month, Harriman and Pearce, acting for the Union Pacific interests, began purchasing Northern Pacific stock, and before May 4th, 1901, acquired considerably more than a majority of the total stock of that Company.

(7) About May 1st, 1901, J. P. Morgan & Co. agree with Mr. Hill to retire the preferred stock of the Northern Pacific Railway Co. and purchase a large block of the common stock and thus take the control from Harriman and Pearce, provided Hill and his associates will co-operate with J. P. Morgan & Co. in controlling the property of the Northern Pacific.

(8) Following this agreement, and between May 4th, and May 8th, 1901, J. P. Morgan & Co. purchase on the stock exchange $15,000,000 par

value of the Northern Pacific common stock, being sufficient to give Morgan and his associates a clear majority of the common stock.

(9) May 9th, 1901, Northern Pacific common stock sold as high as $1,000.00 per share as a result of such purchase and corner in the stock. This was followed by the panic of that day.

(10) On May 11th, 1901, Hill, J. P. Morgan & Co., and Harriman meet and agree that Morgan shall name the next Board of Directors of the Northern Pacific Railway Company, and make public announcement of this fact, in order to allay the panic.

(11) Early in June, 1901, J. P. Morgan & Co. and their associates, and Mr. Hill and his associates agree to form a corporation, which shall take over the stock of the Great Northern and Northern Pacific Railway Companies.

(12) During the same month, W. P. Clough, Vice President of the Great Northern Railway Company and M. D. Grover, its general counsel, began searching in Minnesota for a territorial charter which would be *"beyond legislative amendment."* This search and examination of the laws of Minnesota, as well as New York and New Jersey was continued during the summer of 1901 for the purpose of finding a place where such a corporation could be safely organized.

(13) July 4th, 1901, J. P. Morgan returns from Europe and announces the names of the Board of Directors to be subsequently elected by the Northern Pacific stockholders.

(14) Following this,and during the same month, the Directors of the Northern Pacific Railway Company meet. Five members resign at Morgan's request, and five persons are selected by the Board to fill the vacancies caused by such resignation. Mr. Hill, President of the Great Northern Railway Company is elected at this meeting as one of such directors.

(15) During the early part of July, 1901, J. J. Hill fixes the basis upon which the stockholders of the Great Northern and Northern Pacific Railway Companies shall exchange their stock for that of the Northern Securities Company when it shall be organized. The rates so fixed by Mr. Hill being $180.00 for Northern Securities stock for each $100.00 par value of the Great Northern Railway Company, and $115.00 for Northern Securities stock for each $100.00 par value of the Northern Pacific. At this time Great Northern Railway Company's stock was selling in the market, and continued so to sell during the balance of the year, at from $195.00 to $200.00 per share.

(16) In August, 1901, Hill and his associates decide to amend the By-laws and adjourn the annual meeting of the Northern Pacific Railway Company, if necessary, in order to prevent Harriman

and Pearce who held a clear majority of all of the stock of the Northern Pacific Railway Company, from electing a Board of Directors hostile to the plans of Hill and Morgan for retiring the preferred stock of the Northern Pacific Railway Company, and placing the complete control of that Company with the holding company when organized.

(17) During September, 1901, Morgan and Co. open negotiations with Harriman and Pearce for the purpose of acquiring the latter's stock holdings in the Northern Pacific Railway Company for the Northern Securities Company, when organized.

(18) Early in November, J. P. Morgan & Co. agree with Harriman and Pearce that the Northern Securities Company, when organized, will take over the latters' stock holdings in the Northern Pacific Railway Company and issue $82,492,871 of the Northern Securities Company's stock at par in exchange therefor, and pay a cash bonus of $8,915,629. Harriman testified that he and his associates would not agree to part with their Northern Pacific stock until they saw that the threat of Hill and Morgan, to retire the preferred stock and thus rest control from the Union Pacific interest, was about to and actually would be carried out. See folios 2289 et seq. of the record.

(19) On November 13th, 1901, the Board of Directors of the Northern Pacific Railway Company passed a resolution retiring the preferred stock

of that Company, as J. P. Morgan & Co. had agreed with Mr. Hill, would be done.

(20) On November 13th, 1901, three men selected by Mr. Hill and Mr. Morgan, or their representatives, organize the Northern Securities Company and adopt the charter set forth in appellant's bill.

(21) On November 13th, 1901, these three men meet and pass a resolution authorizing the officers of the Northern Securities Company to take over the Northern Pacific common stock and issue stock of Northern Securities Company therefor on the basis already stated.

(22) On November 14th, 1901, the same three men, acting for the Northern Securities Company, pass a resolution authorizing that Company to take over the stock of the Great Northern Railway Company and issue its stock in exchange therefor on the basis already stated.

(23) On November 14th, 1901, the Board of Directors of the Northern Securities Company is made to consist of fifteen persons,and the three organizers of the Company resign, and some of the real parties in interest are elected in their place.

(24) November 15th, 1901, the Board of Directors of the Northern Securities Company pass the resolution already quoted relative to taking over the holdings of Harriman and Pearce in the Northern Pacific Railway Company.

(25) On November 20th, 1901, the Northern Securities Company had acquired nearly all of the then issued common stock of the Northern Pacific Railway Company and about $41,000,000 par value of the preferred stock.

(26) On November 22nd, 1901, Mr. Hill, as President of the Northern Securities Company issued, and had mailed to the stockholders of the Great Northern Railway Company the letter recommending and suggesting the exchange of the Great Northern stock for stock of the Northern Securities Company. This letter is appellant's Exhibit "10," Fol. 3200 of the record.

(27) On November 25th, 1901, the Great Northern Railway Company amended its by-laws so that all stockholders' meetings would thereafter be held outside the State of Minnesota, and in the City of New York.

(28) On November 30th, 1901, Mr. Hill signed the personal letter or circular to the stockholders of the Great Northern Railway Company, being appellant's Exhibit "11," Fols. 3205 to 3208 of the record.

(29) About December 27th, 1901, the Northern Securities Company had acquired a large majority of the stock of the Great Northern Railway Company.

(30) On January 1st, 1902, the Northern Securities Company exercised its right as a common

stockholder of the Northern Pacific Railway Company to convert the $41,000,000 of preferred stock of that Company, received from Harriman and Pearce, into common stock under the process of retirement; thus giving to the Northern Securities Company about $153,000,000 out of $155,000,000 of the total authorized and issued stock of the Northern Pacific Railway Company.

(31) Early in January, 1902, the purpose and effect of the consolidation of the Great Northern and Northern Pacific Railway Companies in and through the Northern Securities Company is clearly demonstrated; and on January 23rd, 1902, the General Freight Agents of both the Great Northern and Northern Pacific Railway Companies respectively issue a joint circular letter withdrawing all competitive or equalizing rates between every junction point of those two Railway Companies in the State of Minnesota and elsewhere. These letters are appellant's Exhibits "27" and "29," Fols. 3592 and 3598 of the record.

(32) On March 10th, 1902, the Federal Government began its suit against these appellees, and the State of Minnesota, through the Governor and Attorney General, announced that suit was about to be instituted by the State of Minnesota against these appellees.

(33) On March 27th, 1902, the General Freight Agents of the Great Northern and Northern Pacific Railway Companies issued *individual* letters, can-

celling the *circular letters* of January 23rd, 1902, and informed all their agents at junction points that if business presented itself to be handled between junction points of the Great Northern and Northern Pacific Railway Companies, and it became necessary to shrink charges in order to meet competition, that the agents should then take up such matter with the General Freight Agent who would give the agents special instructions relating thereto. See appellant's Exhibit "28," Fol. 2595 of the record.

(34) Immediately after January 1st, 1902, all competition ceased between the Great Northern and Northern Pacific Railway Companies, as shown by the testimony.

From the evidence of Mr. Beck it appears, that the removal of a joint rate between competitive points limited him in shipments to the use of the Great Northern Railway, which delayed delivery of goods two or more days in transit.

From the evidence of Mr. Weld it appears that far better accommodations were furnished students and teachers of the Normal School at Moorhead in traveling over the lines of the Northern Pacific Railway than were furnished subsequent to the practical consolidation of these roads.

From the evidence of Mr. Weideman it appears that adjacent to a competitive point far less facilities for the shipment of grain in the matter of furnishing cars were given him after the organization of the Northern Securities Company than covering

a period of a great many years before. That subsequent to this date his business was unsolicited and accommodations extended before refused.

From the testimony of Mr. Leach it appears that a spur track which for sixteen years had been maintained to a point at the center of his farm was taken up by the Great Northern Railway Company and he was thereafter required to haul his grain to the nearest point of shipment, upon the through line of the Northern Pacific Railway. In this manner after Sept. 12, 1902, Mr. Leach was discommoded in the shipment of his grain raised upon a number of thousand of acres of land by the striking down of competition.

The evidence of all of these witnesses remain entirely unexplained in the record.

VI.

ARGUMENT ON THE LAW.

(1) THE LAWS SOUGHT TO BE ENFORCED BY THE APPELLANT IN THIS ACTION ARE DECLARATORY OF A PUBLIC POLICY OF THE STATE AND REMEDIAL IN THEIR CHARACTER. THEY SHOULD BE LIBERALLY CONSTRUED SO AS TO GIVE FULL FORCE AND EFFECT TO THE INTENTION OF THE LEGISLATURE AND TO ACCOMPLISH THE OBJECTS FOR WHICH THEY WERE PASSED.

This court in the case of *Taylor, et al. v. the United States*, 3 Howard, 210, said:

> "Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them. That they should be construed so as most effectually to accomplish the intention of the legislature in passing them."

Speaking through Justice Swayne, in the case of *Cliquot's Champagne*, 3 *Wall.* 114, this court said:

> "Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects."

So in the case of *United States v. Hartwell*, 6 *Wall.* 385, the Court said:

> "The words must not be narrowed to the exclusion of what the legislature intended to embrace. * * * When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature."

In the case of *United States v. Hodson*, 10 Wall. 395, this Court said:

> "What is implied in a statute is as much a part of it as what is expressed."

See also *Wilson v. National Bank*, 103 U. S. 770.

In *Hawaii v. Mankichi*, 190 U. S. 197, quoting from the syllabus, this Court said:

> "In interpreting a statute the intention of the law-making power will prevail even against the letter of the statute; a thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter."

Noyes on Incorporate Relations, Section 33, sums up the decisions construing statutes of this character in the following language:

> "Constitutional and statutory provisions against the consolidation of competing lines of railroad are *not penal in their nature, but are declaratory of the policy of the state* in favor of the preservation of competition and are entitled to a liberal construction. The purpose

of constitutional conventions in adopting such provisions and of legislatures in enacting such laws was to place an effective bar against any union of railroad companies whereby competition might be removed.

"While, therefore, the term 'consolidation' is generally used to describe a union of corporate properties and stockholders by the process of absorption or fusion, it has a broader meaning as used in constitutional and statutory provisions against the consolidation of competing railroads, and is here used in the sense of 'join' or 'unite.'"

See also, *Hornsby against Eddy, et al.*, 56 Fed. Reporter, 461.

Schus v. Powers-Simpson Co., 85 Minn. 447.

Southerland on Statutory Construction, 218.

With these principles in view, let us turn to the language of the statute. The Act of 1874 provides that "No railroad corporation or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchises of such corporations with, or lease or purchase the works or franchises of, or *in any way* control any other railroad corporation owning or having under its control a parallel or competing line."

The Act of 1881 provides that "No railroad corporation shall consolidate with, lease or purchase, or *in any way* become the owner or control any other railroad corporation, or stock, franchises, rights or property thereof, which owns or controls a parallel or competing line."

From the language used in the Act of 1881, it would appear that the legislature considered that possibly the Act of 1874 might be limited to the stockholders, lessees, purchasers or managers of any railroad corporation, and thus provided in the later Act that no railroad corporation *itself* should consolidate with another owning or controlling a parallel or competing line.

The omission in the Act of 1881 of the words "lessees, purchasers or managers" is very significant, showing clearly that the legislature considered that the Act of 1874 prohibited the "*lessees, purchasers or managers*" of any railroad corporation from in any way consolidating the stock, property or franchises of such railroad corporation with those of a similar corporation owning or controlling a parallel or competing line.

In construing and enforcing the acts of 1874 and 1881, appellant contends:

FIRST. That the term "*railroad corporation*," used in the acts includes the stockholders of such a corporation and prohibits a consolidation or control by them when acting for themselves, but as such stockholders, as fully as the corporation itself, when they act through and for it.

SECOND. That the term "*purchasers of a railroad corporation*," as used in the act includes and applies to a purchase by acquiring the stock of such corporation and the Northern Securities Company is a purchaser within the meaning of this act.

THIRD. That the term *"Managers of a railroad corporation,"* as used in the act, applies to and includes the stockholders of such corporation.

FIRST.

What is meant by the term *"Railroad corporation?"*

On the threshhold of this question, it is well to bear in mind what a corporation is. The right to be a corporation is a franchise or right conferred by the state, upon certain individuals who have made application to the state for such privilege; and who, when the Articles of Incorporation are adopted and filed in accordance with the laws of the state, become a corporation. These incorporators are not only the stockholders of, but the corporation itself. They become entitled to transact business through the legal fiction or entity represented by the name they have adopted for that purpose. The title to all property taken in the name of this legal entity is held in trust for the stockholders of the corporation. In fact the stockholders are the corporation and the name adopted is a mere legal fiction, through which the law permits them to transact business.

In *Baltimore & Potomac Railroad Company v. Fifth Baptist Church*, 108 U. S., 330, this court said:

> "Private corporations are but associations of individuals united for some common pur-

pose and permitted by the law to use a common name and to change its members without a dissolution of the association."

In *People v. Watertown Assessors*, 1 Hill, 620 the Court said:

> "The shareholders vested with the corporate powers are the body corporate, corporation or company."

Morawetz on Private Corporations, 2nd Edition, Vol. 1, page 2 lays down the conclusion on this subject as follows:

> "It is essential to a clear understanding of many important branches of the law on corporations to bear in mind distinctly that the existence of a corporation, independent of its stockholders is a fiction, and that the rights and duties of an incoporated association, are in reality, the rights and duties of the persons who compose it and not of an imaginary being."

To the same effect, see Taylor on Private Corporations, Section 50.

We do not contend that in considering a corporation in the abstract, it is not a legal entity in the sense that in or with it may rest the title to property; but we do contend that when it comes to motive or action; that alone emanates from the stockholders, who are the vital or acting part of the corporation. They are the *only* vital part of the corporation. Without them the legal entity cannot exist; and when they do not act it lies dormant, inactive.

In the case of *State v. Standard Oil Co.*, 30 N. E. Rep. 279, the Court points this distinction in clear language. The Court said:

> "The claim is based upon the argument that the corporation is a legal entity, separate from its stockholders; that in it is vested all the property and powers of the company, and can only be affected by such acts and agreements as are done or executed on its behalf by its corporate agencies, acting within the legitimate scope of their powers; that its stockholders are not the corporation; that their shares are their individual property, and that they may each and all dispose of and make such agreements affecting their shares as best suit their private interests; and that no such acts and agreements of stockholders, subservient of their private interests, can be ascribed to the company as a separate entity, though done and concurred in by each and all of its stockholders. The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only an idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguishing between the corporate debts and property of the company and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim *in fictione juris subsistit aequitas* is used and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy

of the fiction, they have always been disregarded by the courts. Broom Leg. Max. 130. 'It is a certain rule,' says Lord Mansfield, C. J., 'that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' Johnson v. Smith, 2 Burrows, 962.

"No reason is perceived why the principles applicable to fictions in general should not apply to the fiction 'that a corporation is a personal entity, separate from the mutual persons who compose it, and for whose benefit it has been invented.' One author seems to think that it has outlived its usefulness; that it is 'a stumbling block in the advance of corporation law towards the discrimination of the real rights of men and women,' and should be abandoned. Tayl. Corp. § 51. Among the many attempts that have been made to define the nature of a corporation, that given by Mr. Kyd, discarding, or at least not adopting, the metaphysical distinction of a legal entity separate from the persons comprising it, is certainly the most practical, presenting, as it does, the real nature of a corporation as seen in its constituents, and in the manner that it is formed and transacts its business. His definition is: 'A collection of many individuals united into one body, under a special denomination, having perpetual succession under the artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive according to the design of its institution or the powers conferred upon it, either at the time of its creation or any subsequent period of its existence.' 1 Kyd, Corp. 13. In brief, then, a corporation is a collection of

many individuals, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual. 'The statement,' says Mr. Morawetz, 'that a corporation is an artificial person or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body. A corporation is really an association of persons, and no judicial *dictum* or legislative enactment can alter this fact.' See his work on Corporations, § 227. So that the idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, when the question is as to whether a certain act was the act of the corporation or of its stockholders, can not be decisive of the question, and is therefore illogical; for it may as likely lead to a false as to a true result."

In *People v. North River Sugar Refining Company*, 24 N. E. Rep. 834, the Court of Appeals of New York said:

"The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what, in a given case, has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but, as between it and the state, the substantial inquiry is only what that collective action and agency has done; what it has in fact accomplished; what is seen to be its

effective work; what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to rebound to their benefit, to strengthen their hands, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction."

In the case of *Ford v. C. M. S. Association*, 39 N. E. 655, the Supreme Court of Illinois said:

"It is urged that the corporation cannot alone enter into a trust or combination that could be a violation of this statute. While it is true, as a general proposition, that a corporation may be created and constituted a legal entity, existing separate and apart from the natural persons composing it, yet it cannot act independently, or against the will, or abstain from complying with the direction, of the natural persons who constitute the corporate body. A corporation is in fact an association of persons united in one body, having perpetual succession, vested with political rights conferred upon it by the authority creating it."

In the light of these decisions, let us study the language of this act. It provides:

> "No *railroad corporation* shall consolidate the stock of such corporation with, or *in any way control* any other corporation, etc."

How can a railroad corporation consolidate the stock issued by it with any other corporation? It does not own the stock after it is issued, and before issuance, it cannot act, for, without stockholders it is dormant. The stock after issuance belongs to the stockholders, they alone acting for themselves, but as such stockholders, or through the corporation itself, can perfect such consolidation. Clearly the legislature intended to prohibit a consolidation by reason of stock ownership, or any other form of control. The act of 1881, in contradistinction, prohibits any railroad corporation *itself* from consolidating with, leasing, purchasing, or in any way becoming the owner of any other railroad corporation, or the stock, franchises, rights or properties thereof. Does not this later act clearly show that the legislature understood that the term *"railroad corporation"* in the act of 1874 included and referred to the stockholders of such corporation as well.

Laws of this character would be of little force, if all or a majority in interest of the stockholders of a railroad corporation, acting individually, but by virtue of their stock holdings, can do that which the legal fiction or name they have adopted, and which in itself is dormant without their action, cannot do.

The testimony in this case shows that the promoters of the Northern Securities Company intended to avail themselves of the legal fiction, that a corporation is an entity, separate and distinct from its stockholders, so as to evade the laws of the state of Minnesota sought to be enforced in this action.

Testifying on this subject, Mr. Clough said:

> "Speaking for myself, I never had the slightest doubt of the right of a corporation, even under the laws of the State of Minnesota or the laws of New Jersey, or of any other state, that was not a *railroad corporation*, to acquire, hold and own the stocks of the Northern Pacific and Great Northern Railway Companies."

On this same subject, Mr. Stetson, General Counsel for J. P. Morgan & Co., testified as follows:

> "Q. You knew at that time that there was litigation years before with reference to the consolidation of the stock of the Northern Pacific and the Great Northern Railway Companies?
>
> A. Oh, I am very familiar with that. That Pearsall suit was brought in consequence of my objections at the time.
>
> Q. And naturally the questions to which I attract your attention would be one of the primary matters which you would consider, isn't that true?
>
> A. Yes, if it hadn't been so largely laid at rest by the decision in the Pearsall case which I thought authorized any private person to own the stock of those roads.
>
> Q. But the Northern Securities Company was not a private person?
>
> A. I considered it so, in that sense. I don't know what other people thought; I know what I thought.
>
> Q. Of course I am not asking you what you thought; that would be privileged.

A. Well, I am perfectly willing that any one should have my opinion as to the matter.

Q. Then, I infer from your statement, Mr Stetson, that you evidently proceeded in the organization of the Northern Securities Company upon the theory that the case to which you refer authorized or permitted the action to which your attention has been called, that is, this class of organizations, as well as taking on of the stock of the Northern Pacific and the Great Northern.

A. I don't say it authorized or permitted it; I say I think it recognized it."

(See Fols. 2672 to 2674 of the record).

With this declaration on the part of the promoters of this scheme to evade the laws of the State of Minnesota, a court of equity should not permit them to avail themselves of a legal fiction for that purpose.

As said by the court in *Wood v. Ferguson*, 7 Ohio St. 288:

> "The doctrine itself is but a legal fiction, and like other legal fictions, was invented to enable courts to arrive at conclusions which would do justice, and at the same time preserve the semblance of logical consistency. They were invented for the advancement of justice and will be applied for no other purpose. * * * * *We know of no exceptions to the rule that where a legal fiction would work injustice, courts will refuse to recognize it.*"

The English authorities all announce the principle "that a fiction of law shall never be construed so as to defeat the ends for which it was invented, and when urged for an intent and purpose not within the reason and policy of the fiction, the courts will not recognize or accord any rights under it."

In the case of *State v. Standard Oil Company, supra*, it is held:

> "All fictions of law have been introduced for the purpose of convenience and to subserve the ends of justice. It is in this sense that the maxim *in fictione juris subsistit aequitas* is used and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts."

We know of no case where a court has allowed parties to avail themselves of a legal fiction to do a manifest wrong, or to evade the declared public policy and purpose of a sovereign state.

In view of these principles, the appellant asserts that the acts of the owners of a majority or controlling interest of the stock of the Great Northern and Northern Pacific Railway Companies in forming the Northern Securities Company for the declared purpose of controlling and managing the Great Northern and Northern Pacific Companies, and after its formation turning over to it the stock of those railway companies so held by them, is a consolidation of these two railway companies prohibited by the words "*no railroad corporation* shall consolidate the stock, property or franchises of such corporation with, or in any way, control any other railroad or corporation owning or having under its control a parallel or competing line."

The phraseology of the statute shows that the legislature intended not only to prohibit a consol-

idation, but any method of control. It says: "Shall not consolidate or *in any way* control."

It hardly seems necessary to urge that placing the ownership of a majority of the stock of these two railway companies in a single corporation constitutes a unity of control of these corporations, especially when the incorporators themselves say that is their intention.

This court said in the case of *Pearsall v. The Great Northern Railway Company*, 161 U. S. 671:

> "With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course and the mastership of the Northern Pacific would be assured."

In discussing this subject in a case where the facts in some respects are similar to this case the Supreme Court of Pennsylvania in *Penn. Ry. v. Commonwealth*, 7 Atl. Rep. 371, said:

> "In view of this plain and candid statement of the real facts of the case by the parties themselves, it is impossible, as we have already said, to draw any other inference than that the real party contracting and stipulating for the control of the South Pennsylvania Railroad Company was the Pennsylvania Railroad Company, and that any title to any stock or securities intended to be held in the name of the Pennsylvania Company was to be a mere naked legal title, to be held in trust. In other words, that the Pennsylvania Railroad Company intended to do in fact what it feared it was forbidden by law to do, and therefore attempted to give the transaction the appearance, in the eye of the law of being other than it really was. This, of course, cannot avail in

a court of equity, which looks at substance, without being controlled by form.

It is further strenuously urged, on behalf of defendants, that even if the Pennsylvania Railroad Company be the real party to the contract, it has not done or stipulated for anything prohibited by the constitution, for the reason that the purchase of the stock of a 'parallel or competing line' is not among the things prohibited; and the case of *Pullman Palace Car Co. v. Missouri Pac. R. Co.*, 6 Sup. Ct. Rep. 194, (recently decided by the supreme court of the United States.) is cited to sustain the proposition that the ownership of the stock of a corporation does not give control of the corporation. We have carefully considered the opinion delivered in that case, which, although not of binding authority upon the state courts, because not deciding a federal question, is yet, in view of its source, entitled to the highest respect. But we do not think it sustains the position contended for. The decision of the question of control was not called for in the case, which was already decided on another and a fundamental point. But waiving this, the point decided is merely that the ownership of the stock does not necessarily give control of the road. The chief justice says, speaking of the stockholding company: 'Practically it may control the company, but the company alone controls its road.' 6 Sup. Ct. Rep. 199. This decision seems very narrow, but it is certainly involved in the conclusion reached, which cannot stand unless it is recognized; for it is too plain to bear argument that the ownership of the stock of a corporation carries with it the control of the corporation. Indeed, this is merely a different way of stating the truism that a corporation is controlled by its stockholders. That they do it through the agency of a board of directors and other officers does not alter the fact."

In the case of *People v. Chicago Gas Trust Co.*, 22 N. E. 798, the Court said:

> "Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations, and weld them into one huge combination? * * * It cannot be denied that the appellee, as owner of a majority of the shares of stock of these four companies can control them in the exercise of all their corporate powers through a board of managers of its own selection."

In *Weidenger v. Spruance*, 101 Ill. 278, the Court, through Mr. Justice Schofield said:

> "The stockholders elect the directors, and, through them, carry into effect the corporate functions. Presumably, the directors act in obedience to the aggregate wishes of the stockholders."

In the case of *Farmers Loan & Trust Co. v. N. Y. & N. Ry. Co.*, 44 N. E. 1046, the Court said:

> "The appellants contend that the New York Central & Hudson River Railroad Company, as such majority stockholder, also acquired the entire control of the affairs of the New York & Northern Railway Company through its board of directors, who were willing to serve the interests of those owning a majority of the stock, as was indicated by the resignation of three of the directors, the appointment of others in their places, by the resignation of two officers who occupied important positions in the affairs of that company, and by the appointment of two officers in their places who were in the employ of the New York Central

& Hudson River Railroad Company. While the proof upon that question was not, perhaps, conclusive, yet the circumstances developed by the evidence plainly indicate that, after it became the owner of a majority of the stock and bonds, the New York Central & Hudson River Railroad Company dictated and governed the action of the board of directors, and controlled the management of the affairs of the New York & Northern Railway Company.

The facts already referred to are strong proof that the New York Central & Hudson River Railroad Company was in the control of the affairs of the New York & Northern Railway Company. It is hardly to be supposed that a board of directors which was not under the control of another corporation would appoint three of the friends of the president of that corporation as directors of the company, and place the officers of that company in control of its financial affairs, especially when it was the owner of competing lines of railroad. The clear and legitimate inference to be drawn from the circumstances proved in this case is that after the New York Central & Hudson River Railroad Company purchased a majority of the stock and bonds of the New York & Northern Railway Company, it controlled its officers and directors as fully and completely as though they had been elected by its votes. All the facts and circumstances, so far as the defendants were permitted to prove them, tend to show that such was the situation. Indeed, it is a matter of common knowledge that, where the ownership of a majority of the stock of such a corporation changes, the board usually changes, unless its members are already in harmony with the policy of the purchasers."

It is difficult to see how any one can contend that ownership of a majority of the capital stock of a corporation does not vest in such owners the com-

plete management and control of such corporation. The owners of such stock elects its board of directors, who, presumably will carry out the purpose and intent of the owners of a majority of the stock.

That this was the declared intention of the incorporators of the Northern Securities Company, is clearly shown by the testimony of the witnesses Baker, James, Thorne, Kennedy, Morgan and Hill, already quoted. These men, with other stockholders now constitute the Northern Securities Company, and we have a right to take their conclusions on their own acts in determining the results actually accomplished.

The acquisition of a majority of the capital stock of the Great Northern and Northern Pacific Railway Companies by the Northern Securities Company effects as complete a consolidation of the property and franchises of such corporations as though one had purchased all the property and franchises of the other.

In the absence of the testimony of Baker, Thorne, and James, which was not taken in the Federal case, but appears in the record in this case, and has already been quoted, the four Circuit Court Judges, in considering this branch of the case in *United States v. Northern Securities Company*, et al., 120 Federal Reporter, page 721, said:

> "It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated

and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. It was the method pursued by the Northern Pacific and Great Northern Companies to obtain control of the Chicago, Burlington & Quincy Railroad; and, so long as directors are chosen by stockholders, the latter will necessarily dominate the former, and in a real sense determine all important corporate acts.

"The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in Pearsall v. Great Northern Railway, 161 U. S. 646, 671, 16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has been recognized and declared by other courts. Pennsylvania R. Co. v. Commonwealth (Pa.) 7 Atl. 368, 371; Farmers' Loan & Trust Co. v. New York & Northern Railway Co., 150 N. Y. 410, 425, 44 N. E. 1043, 34 L. R. A. 76; People ex rel v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 802, 8 L. R. A. 497, 17 Am. St. Rep. 319. In opposition to this view counsel cite Pullman Car Co. v. Missouri Pacific Co., 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499, but in that case the meaning of the word 'controlled' as used in a private contract, was the point under consideration, and what was said on the subject cannot be held applicable to cases arising under the anti-trust act, when the point involved is whether the ownership of all of the stock of the two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership.

> "What has been done through the organization of the Securities Company accomplishes the object which Congress has denounced as illegal more effectually, perhaps, than such a combination as is last supposed. That is to say, by what has been done the power has been acquired (and provision made for maintaining it) to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. Competition, we think, would not be more effectually restrained than it now is under and by force of the existing arrangement if the two railroad companies were consolidated under a single charter."

It cannot, and will not, be denied that competition between parallel and competing lines is the declared public policy of this State. Such public policy may be declared by statute, by the decisions of the courts of the State, or by the acts of the public officials of the State.

Regarding the method of ascertaining what is the public policy of a State, the Supreme Court of Illinois, in the case of *Harding v. Glucose Co.*, 55 N. E. 599, said:

> "The public policy of a state is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts, and in the constant practice of government officials. When the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it indicates."

See, also, *United States v. Trans-Missouri Freight Ass'n.*, 166 U. S. 290.

In addition to the legislative enactments on this subject, the Supreme Court of the State of Minne-

sota, in the case of *Stewart v. Transportation Co.*, 17 Minn., 372, has decided:

> "It is against the general policy of the law of this State to destroy or interfere with free competition."

SECOND.

The term "*purchaser of a railroad corporation*," as used in the act of 1874, includes a purchase by acquiring the stock of such corporation, and the Northern Securities Company is a purchaser within the meaning of this act.

A railroad corporation is purchased by the acquisition of a majority or all of the stock of such railroad corporation. This is the general meaning of the term "*to purchase a railroad corporation*," as used by Mr. Morgan and Mr. Hill in this case, when they both testify that they *purchased* the C. B. & Q. Railroad Company. They purchased about 95% of the capital stock of that company from the stockholders of that corporation, and thus "*purchased*" the railroad, as they say. This is equally true of many of the subsidiary lines now owned by both the Great Northern and Northern Pacific Railway Companies, as shown by the record. Either the Great Northern or Northern Pacific Railway Companies have "*purchased*" a majority or all of the capital stock of such subsidiary companies. No other transfer of ownership or muniment of title was ever given or taken in the purchase of the Burlington road, or any of the other companies last above referred to, other than a transfer of the capi-

tal stock of such railroad corporations so purchased.

This term has been used and recognized in the business world for many years. One often hears the statement made that such and such a railroad corporation has been "*purchased*" in the open market by a purchase of a majority of the issued capital stock of such railroad corporation. This was the method by which Harriman and Pearce sought to "*purchase*" the Northern Pacific in opposition to Mr. Morgan and Mr. Hill, as stated by them.

The courts have also recognized the acquisition of a majority of the capital stock of a railroad corporation as a purchase of such railroad corporation, and the person who takes such stock, as the "*purchaser*" of such a railroad corporation.

In the case of *Williamson v. N. J. S. R. R. Co.*, 26 N. J. Eq. Reports, page 398, in deciding whether or not railroad corporations had been consolidated as authorized by law, the Court said:

> "For the purpose of acquiring them, and as the means of consolidating the road and property of the latter company with others, they purchased capital stock of that company to the extent of sixteen-seventeenths of the whole amount. * * * The purchase and sale and delivery of the stock (sixteen-seventeenths of the whole), by virtue of the legislative authority referred to, for the purpose of consolidation, and the consequent, actual, practical and absolute consolidation completely recognized in all things will be held in equity to be a consolidation in accordance with the provisions of the act."

In the case of *Hill, et al. v. Nisbitt, et al.*, 100 Ind. Reports, page 341, in construing an act of the legislature authorizing a consolidation of railway corporations in that State, the Court said:

> "Section 3951, R. S. 1881, authorizes any railroad corporation organized under the provisions of the general railroad law, 'to acquire, by purchase or contract, the road, road-bed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect' its line; and if in any case it should appear to be a necessary or reasonable means to that end, no reason is perceived why it might not be *accomplished by purchasing the stock, instead of purchasing the corporate property directly.* In short, the purchase of stock by one railroad corporation in another will be upheld whenever it is a necessary or reasonable means to the accomplishment of an end proposed, which is within the scope of its statutory powers.
>
> "Keeping in view the averments in the complaint, from which the purpose for which the stock was purchased may be fairly inferred and considering the broad and comprehensive powers, conferred by the statutes on railroad corporations, authorizing them to acquire real and personal property 'necessary to accomplish the objects for which the corporation is created,' and to acquire the property of and consolidate with uncompleted connecting and intersecting lines, and we cannot say that the purchase of the stock was unauthorized. R. S. 1881, Sections 3903. 3951."

See, also, *Todd, et al. v. Kentucky Union Land Company, et al.*, 57 Federal Reporter, page 47.

Marbury v. Kentucky Union Land Company, 62 Federal Reporter, page 335.

In the case of *Kohl, et al. v. United States*, 91 U. S., page 367, quoting from page 374, this Court said, in defining the meaning of the word *"purchase:"*

> *"Purchase* includes all modes of acquisition other than that of descent."

CHAPTER TWO HUNDRED AND TWENTY-EIGHT OF THE LAWS OF APPELLANT FOR THE YEAR 1889 AND AS CODIFIED IN PARAGRAPHS 2715 TO 2717 COMPILATION OF THE STATUTES OF MINNESOTA 1894, VERY CLEARLY SHOWS THAT THE LEGISLATURE INTENDED TO PROHIBIT THE CONSOLIDATION OR CONTROL OF PARALLEL AND COMPETING LINES OF RAILWAY BY STOCK PURCHASE OR OWNERSHIP.

The acts in question, prohibiting such consolidation, also *authorize* the consolidation of connecting lines by purchase of stock, stock ownership or control, for the purpose of forming a continuous and connecting line. The acts provide as follows:

> "Any railway company of this state, empowered by the laws thereof to *consolidate* its railway property and franchises, or any portion thereof, of another railway company, or to purchase the railway property and franchises, or any part thereof, of another railway company, *may effect such consolidation or purchase by acquiring the stock*, bonds or other securities of such other railway company; and for the special purpose of acquiring the same, may create, issue or dispose of its own stock, bonds or other securities, in addition to the amounts of the same it is otherwise empowered to issue, to an amount not exceeding the actual value of the stock or bonds of such other company acquired by it."

(See paragraphs 2715-16-17, Vol. 1 of the Statutes of this State, compilation of 1894).

These provisions authorizing consolidation or control by purchase of stock are a part of the same acts prohibiting such a consolidation when parallel and competing lines are involved. Thus clearly showing that it was the purpose and intent of the legislature to prohibit any consolidation or control of competing lines of railway in the manner attempted through the Northern Securities Company.

This legislative construction of the laws themselves, by the body enacting them, should be given great weight by the Court in the determination of this question.

The right to own a railroad corporation or the ownership of a railroad corporation, which is the result of a purchase, is a right belonging to and vested in the stockholders of such railroad corporation. This is a franchise or right separate and distinct from the legal entity or fiction represented by the name of the corporation, and in which the title to the property controlled or managed through the corporation, is vested, in trust for its stockholders.

The Supreme Court of the United States in *Memphis Railroad Co. v. Commissioners*, 112 U. S. 619, said:

> "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a

foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators."

In the case of *Fietsan v. Hay*, 13 N. E. Rep. 501, the Court said:

"Such a corporation has been well defined to be an 'artificial being; created by law and composed of individuals, who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting within the scope of its charter' as a natural person. Now, a franchise is nothing more than the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter. This right of a body of men to be and act as an artificial person, without, as a general rule, incurring individual responsibilities, is declared by Blackstone to be 'a royal privilege or branch of the king's prerogative subsisting in the hands of a subject.' 2nd Bl. Comm. Such right or franchise is defined by Bouvier to be 'a certain privilege conferred by Grant from Government and invested in individuals.' Now, it is clear from these definitions, and from the very nature of the corporation, that a franchise, or the right to be and act as an artificial body, vests in the individuals who compose the corporation, and not in the corporation itself."

Noyes on Intercorporate Relations, paragraph 131, summarizes this principle as follows:

> "The franchise to be a corporation belongs to the stockholders and not to the corporation. The grantees of the charter are, primarily, the corporators, and the franchise is vested in them, their associates and successors. The corporation when formed may itself take, under the charter, special rights and privileges—also termed franchises—necessary to carry into effect the objects for which it was formed, but the franchise to be a corporation remains in the stockholders. 'A corporation is itself a franchise belonging to the members of the corporation; and a corporation being itself a franchise may hold other franchises as rights and franchises of the corporation.' * * *
>
> "As the franchise of corporate existence belongs to the stockholders of a corporation, they may, practically, transfer it by the sale of their shares of stock; and, in a sense, the sale of a single share amounts *pro tanto* to a transfer of an interest in this primary franchise. The purchasers, however, merely become stockholders in the same corporation in place of the vendors—the corporate identity remains unchanged."

The right to be a corporation is the right or power conferred upon the stockholders by the state to direct the management and control of the property, the title to which is vested in the legal entity represented by the name of the corporation. This right always rests with the stockholders so long as the title to the property remains in the name of the corporation. It is the right to manage and control the property of a railroad corporation standing in its name, which the purchasers of a railroad corporation acquire. That is, where the stockhold-

ers of a railroad corporation sell their capital stock to a new set of individuals, they have, so far as they are concerned, sold the corporation and conferred upon their successors in stock ownership the right to manage and control the property of the railroad corporation. It is this right which the purchasers of a railroad corporation acquire when they purchase its stock, and it is this right which the Northern Securities Company acquired when it acquired a majority of the capital stock of the Great Northern and Northern Pacific Railway Companies; and it is the consolidation of this right in one corporation or one purchaser of all, or substantially all, of the capital stock of the Great Northern and Northern Pacific Railway Companies, which the statute prohibits when it says, "no purchaser of a railroad corporation shall consolidate the stock, property or franchise of such corporation with, or in any way control any other railroad corporation owning a parallel or competing line."

THIRD.

This same argument is equally true as applied to the "*managers*" of a railroad corporation. The court will notice that there are four distinct entities, persons, or combination of persons prohibited from consolidating parallel and competing lines of railway, or in any way controlling the same.

First. No railroad corporation can do it.

Second. No lessees of a railroad corporation can do it.

Third. No purchasers of a railroad corporation can do it.

Fourth. No managers of a railroad corporation can do it.

In considering this question, the purpose and intention of the organizers of the Northern Securities Company, who were the controlling stockholders of the Great Northern and Northern Pacific Railway Companies should have a marked bearing upon the question. As already shown, it was the declared purpose and intention of the promoters and organizers of the Northern Securities Company, and those same persons afterward became its directors and officers, to consolidate and control these two Railway Companies in such a way that neither would do, or permit anything to be done, which would be injurious to the property or business, or in any way interfere with the other.

VII.

IT WAS URGED BY COUNSEL FOR APPELLEES IN THE COURT BELOW, AND THE COURT DECIDED THAT CERTAIN LANGUAGE USED BY THIS COURT IN THE CASE OF *Pearsall v. The Great Northern Railway Company*, 161 U. S. page 646, SANCTIONED THE ACQUISITION OF ALL THE STOCK OF THESE TWO RAILWAY CORPORATIONS BY A HOLDING COMPANY ORGANIZED EXPRESSLY FOR THE PURPOSE OF CONSOLIDATING THEM, AND STIFLING ALL COMPETITION BETWEEN THEM; AND THAT IN SUCH A CASE, THE STATE IS POWERLESS TO ENFORCE ITS LAWS AGAINST SUCH A CONSOLIDATION.

The exact language used in the Pearsall case, from which this startling conclusion is drawn is as follows:

> "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common. This, though possible, would not be altogether feasible, and would require considerable time for its accomplishment. In a few years the two companies might by sales of the stock, so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic. Under the proposed arrangement, however, the Northern Pcific as a company, in return for a guaranty, which the individual stockholders could not give, turns over to a trustee for the entire body of stockholders of the Great Northern one-half of its stock, with the almost cer-

> tainty of the latter securing the complete control, and probably the ultimate amalgamation, of the two companies. If such amalgamation were once affected, it would in all probability be final."

At the outset, we must bear in mind that this is a mere dictum of the court, and the question referred to in the language used was not before the court; it was not urged on the one side nor contested on the other; and the court was not called upon to decide that question. The laws of this state as applied to such a condition were not before the court, nor were the legal objections to any such plan or scheme presented to the court. Under such circumstances, this language is not decisive.

Regarding such expressions in an opinion of the Court, Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheaton, page 398, said:

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of Marbury v. Madison. It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all othe reases is seldom completely investigated."

See also, *United States v. Wong Kim Ark*, 169 U. S., page 679, where the court re-announces this principle.

The case here presented is not at all similar to the one supposed or suggested by the court in the Pearsall case in the language above quoted.

As stated by the Court the plan or scheme of consolidation then before the Court would, in all probability be perpetual or final; so would the plan or scheme adopted by the incorporators of the Northern Securities Company and finally consummated in that company be equally final and perpetual.

In this case we have a corporation immortal in existence, boundless in power, which is centralized in two or more men, which has acquired nearly all of the stock of these two railway companies for the express purpose of unifying, managing and controlling these two corporations, and to destroy all competition between them. In other words, to as fully and completely do that which the statute prohibits as it is possible to do. This, surely, is not sanctioned by the language above quoted in the Pearsall case. It cannot be assumed for one moment that had this question in this form been before the Supreme Court in the Pearsall case, that court would have approved it; because this scheme is as clearly a violation of the laws of this state as the one then before the court. In the Pearsall case, the Supreme Court emphatically denounced a consolidation of these railway companies; and yet counsel seek to use certain language of the court in

that case, as an approval of a consolidation through a device, infinitely more detrimental to the public welfare of the state and dangerous to its citizens, both present and future, than the one declared by the court to be unlawful. Once the seal of judicial approval is placed on the ownership of the stocks of the Great Northern and Northern Pacific Railway Companies by the Northern Securities Company, all hope of possible separation of those companies or benefits of competition, is dead; and the absolute control over them is forever placed with a single individual. Surely the Supreme Court did not intend their judgment of disapproval to be distorted into an approval of such a plan, because the court said:

> "There are, moreover, thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth, which though indirect are even more insidious in their influence, and such as have awakened feelings of hostility, which have not failed to find expression in legislative acts."

How far reaching and destructive this danger will become, not only to the moral sense, but to the material welfare of the community, when such a scheme as that planned and consummated by the incorporators of the Northern Securities Company, has received judicial approval, and through it or some other, all railroads in this state are controlled by a single corporation. The possible—nay, probable results are appalling. That "community of interest" so graphically defined by Mr. Morgan when

he said "*we will own them all*," will then be consummated.

There is a vast difference between a purchase by individuals as suggested by this Court in the Pearsall case, and the acquisition of stocks of different corporations by a holding company, such as the Northern Securities Company. In considering this phase of the question, the Court in *People v. North River Sugar Refining Company*, 24 N. E. Rep. 834, quoting from page 840, said:

> "It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group, at his sovereign will; for it is one thing for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their fortunes in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership."

See also *Stockton v. Central Railway Company of New Jersey*, 24 Atl. Rep. 964.

Now, let us take our bearings on this question, first from the language of the acts themselves. As already pointed out, two things are expressly prohibited by these laws, to-wit:

(a) Any form of consolidation.

(b) Any form of control.

These two prohibitions rest upon any railroad corporation, any purchaser of a railroad corporation, any lessee of a railroad corporation or any manager of a railroad corporation, which corporation owns or controls a parallel or competing line. We fail to see how language broader than this could possibly be used. This language certainly disclosed the intention on the part of the legislature, to prohibit any form of consolidation, or any form of control, which might result in removing competition between parallel and competing lines of railway. The sole thing sought to be preserved to the citizens of this state through this declaration of public policy on its part is competition between competing lines of railway; and any act or combination which removes or destroys such competition is in violation both of the spirit and letter of these laws. As already shown, these acts are declaratory of a public policy, and must be liberally construed so as to give full force and effect to both the intent and purpose of the legislature.

The legislature aimed at practical results. Its clear intent and purpose was to preserve competition between parallel and competing lines of railway in this state. In order to preserve this it has declared that no consolidation shall take place, or

control be obtained, in any form, by or for a railway company, over that of another owning a parallel or competing line, either by consolidation of properties or control through stock ownership.

In the case of *State v. Atchison & N. R. Ry. Co.*, 38 N. W. Rep. 51, the Court in discussing the constitutional provision prohibiting the consolidation of parallel and competing lines said:

> "The constitutional convention aimed at practical results. The character of the title of the parties operating a railway is of but little moment to the general public, while the requirements that different roads shall continue to be competing lines as when they are construed is of the utmost importance to all. The law cannot be evaded, therefore, by substituting a lease for a deed of conveyance. * * * It was clearly within the inhibition of the constitution, and neither its stocks, franchises, or earnings can be joined to any other competing line. The prohibition against the joinder of these prohibits the leasing of such roads. Competition can only be had by securing competing lines, and thus prevent a monopoly in the operation of the roads, and this it did by forbidding the purchase or control of parallel or competing roads under the same management."

In *East St. Louis Connecting Ry. Co. v. Jarvis*, 92 Fed., page 742, the Court said:

> "It is true that with respect to certain local industries, they were not competing, because both had not access to them; but the principal business designed was the transfer of through traffic to the city of St. Louis, and the only company, in connection with the ferry companies with which it connected, was the competitor of the other. We think this plain upon its face, and that no elaboration could

strengthen the statement. The evidence of the case also clearly demonstrates the fact. It appears that in the year 1884 these two companies were cutting rates, buying business, and losing money, and upon the advice of a mutual friend, not then connected with either company or with either of the ferry companies, the two companies concluded to put the two properties under the same management, and as a result the leases in question were made. The effect of this transaction was to place two belt lines under one control, giving connection with all the roads entering East St. Louis and with all the car ferries crossing the river to St. Louis. This, of course, avoided competition and enabled the management to establish rates and avoid the danger of cutting rates. The practical effect was to create a monopoly, stifling competition, and that this was designed is manifest from the terms of the lease. To accomplish it, required not only the lease of the Venice & Carondelet Railway, which was built in the interest of and leased to the Illinois & St. Louis Railroad & Coal Company, but also a lease of the ferry transfer of the latter company. This placed both the belt railways and the ferry transfers under one control. In the lease of the Venice & Carondelet Railway the lessor agreed that during the term of the lease it would not engage in the business of switching cars from any connecting railway for any purpose whatever, nor permit any one operating its road so to do; and in the lease of the ferry the lessor agreed that during the term of the lease it would not engage in or carry on the business of transferring railroad cars in boats or barges across the Mississippi River to or from any point in St. Louis. It would be difficult to conceive a scheme which could more effectually stifle competition and create monopoly.

"Is a lease for ten years a consolidation of the franchises or property, within the constitutional provision? It is contended that the

term 'consolidation' means a permanent union of the interests, management and control of two roads, either in formation of a new company out of the consolidated one, or else by consolidated management of the old ones unitedly while their distinct corporate entities still remained. This distinction is true in the general sense in which one speaks of the 'consolidation' of railroads. The term may also mean the act of forming into a more firm or compact mass, body or system. The constitutional convention, representing the people of the state, sought to provide against monopolies, and to preserve to the public the benefit that would accrue from competition between parallel or competing lines of railway. It sought for practical results. It intended to provide that parallel or competing lines should continue to be competing, and this it aimed to accomplish by prohibiting the consolidation of the stock or the franchises or the property of any such competing lines of railway. The union of such lines was prohibited, in view of the objects sought to be accomplished. The term 'consolidate,' we think, must be construed to have been used in the sense of 'join' or 'unite.' To permit two such competing lines of railway under a single management and a single control would accomplish the very purpose which the constitution sought to prevent. We must have regard to the spirit and the object of that constitutional provision, and not juggle with the technical meaning of the word. The prohibition goes to the consolidation or uniting of the stock of two competing roads, or the franchises of two competing roads, or of the property of two competing roads. The doing of either would create the prohibited monopoly, and either is within the intendment and meaning of the constitutional provision. Nor do we think that there is force in the contention that this union or consolidation was by means of a temporary arrangement, if there-

> by that is accomplished which is prohibited by the constitution. If it be lawful, by means of a lease for 10 years, to consolidate and unite the properties of competing lines of railway, we perceive no reason why a lease for 99 years would not be equally valid. We cannot draw the line in that respect between what is permanent and what is temporary. Whatever produced the prohibited result is obnoxious to the spirit and the letter of the constitutional provision, and is illegal. We must deal with the result accomplished, without regard to the means employed. It cannot be permitted that one may effect a prohibited result by indirection which he may not lawfully accomplish by direct means. We must therefore hold that the leases in question practically effected a consolidation of the properties of two competing lines, and are within the inhibition of the constitution. Morrill v. Railroad Co., 55 N. H. 531; Gulf, C. & S. F. Ry. Co. v. State, 72 Tex. 404, 10 S. W. 81; State v. Atchison & N. R. Co., 24 Neb. 143, 38 N. W. 43."

Supposing that the stockholders of the Great Northern and Northern Pacific Railway Companies respectively, had transferred their stock holdings to a trustee, under an agreement that such trustee should hold and vote the stock of the railway companies in such a manner as to accomplish the very objects and purposes contemplated by the incorporators of the Northern Securities Company; can it be contended for a moment that this would not be an unlawful consolidation within the decision of the court in the Pearsall case?

What distinction can be drawn between the results accomplished by such a consolidation and the

one consummated through the Northern Securities Company.

As already stated, the latter ompany is but a trustee for its stockholders, and consequently acts for them in such manner as they may direct. It must necessarily conduct and control the two railway companies in a manner satisfactory to its Board of Directors and the persons holding its stock. The accomplished result is the same as though the stock of these two railway companies was placed in the hands of a trustee under an agreement, as above indicated.

The stockholders of the Great Northern and Northern Pacific Railway Companies have exchanged their stock holdings for the stock of the Northern Securities Company. The stock is thus pooled forever with the Northern Securities Company, and will be voted by that Company as the combined stockholders of the Northern Securities Company shall direct. The result is a consolidation of these two railway properties through the fiction of a holding company, which consolidation is as effective as though one railway company had acquired all of the stock of the other.

The purpose of the anti-consolidation laws of appellant is to secure competition between parallel and competing lines; not to prevent one form of consolidation and permit another. Now, under the form of consolidation shown in this case, the earnings of both these railway companies are pooled for the benefit of one set of stockholders, to-wit, those of the Northern Securities Company. What motive is

then left for competition? On the contrary, what stronger motive can exist for its destruction?

That this is what was sought to be accomplished by the promoters of this scheme, is shown beyond controversy in the testimony of the promoters themselves, and already quoted.

As Mr. Thorne said:

> "Well, of course, it became self-evident to me that it was to the interests of the Great Northern Company that the Northern Pacific stock should be put in such condition that it could not be used against the interests of the Great Northern * * * and when I became a shareholder in the Northern Securities Company, then, of course, I recognized the fact that it would be for the interest of both of those properties to be together where they could not antagonize one another to their harm." (Fols. 1697 and 1715).

It makes little difference how the result is accomplished. The Court should look beyond the form in these cases, and its conclusion should be determined by the results accomplished.

As said by Judge Jenkins in the case of *East St. Louis Connecting Ry. Co. v. Jarris*, 92 Fed. 743:

> "Whatever produces the prohibited result is obnoxious to the spirit and the letter of the constitutional provision and is illegal. We must deal with the result accomplished, without regard to the means employed. It cannot be permitted that one may effect a prohibited result by indirection, which he may not lawfully accomplish by direct means."

To the same effect see Pennsylvania Ry. Co. v. Commonwealth, 7 Atl. Rep. 368.

The court in *People v. Chicago Gas Trust Company*, 22 N. E. 804, said:

> "But of what avail is it that any number of gas companies may be formed under the general incorporation law of the state, if a trust company can be clothed with the power of buying up and holding the stock and property of such companies, and through the control thereby attained, can direct all their operations and weld them into one huge combination."

So, too, in *Ford v. Chicago Milk Shippers Ass'n.*, 39 N. E. 655, the Court said:

> "Where the organization of the corporate body or the control exercised by the stockholders in determining the agencies selected for managing its business, and the business, as thus conducted, managed and controlled, is against public policy or in a contravention of the statute of a state, such acts of the corporate body and of the individual shareholders are the combined acts of all and courts are not so powerless that they may not prevent the success of ingenious schemes to evade or violate the law. There can be no immunity to evasion of the policy of the state by its own creations."

In *Joy v. St. Louis*, 138 U. S. 50, the Court said:

> "Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public."

In *Louisville & Nashville Ry. Co. v. Kentucky*, 161 U. S. 688, the Supreme Court said:

> "Where companies situated as these are, being parallel and competing, claim that authority to consolidate has been granted to them, they must be able to point to words in the statute, which admit of no other reasonable construction; for it will not be assumed that the law-making power has authorized the creation of a monopoly so detrimental to public interest."

In *Harding v. American Glucose Co.*, 182 Ill. 551, the Court said:

> "It makes no difference whether the combination is effected through the instrumentality of trustees and trust certificates, or whether it is effected by creating a new corporation, and conveying to it all the property of the competing corporations. The test is whether the necessary consequence of the combination is the controlling of prices, or limiting of production or suppression of competition."

That this Court did not have in mind the purchase of the stocks in the manner complained of in this action, is clear from the language used by the court in the Pearsall case:

> "Doubtless these stockholders could lawfully acquire, *by individual purchase*, a majority, or even the whole of the stock of the reorganized company."

This is far from saying that the stock of the Northern Pacific Railway Company could be acquired by a corporation for perpetual ownership, where

such holding corporation is the result of a combination or conspiracy formed for such a purpose and where such holding company already owns all, or even a majority of, the stock of the Great Northern Railway Company.

The stock acquired in the latter manner would not, as said by the Court:

> "Become completely dissevered and the interests of the stockholders of each company thus become antagonistic."

The conspiracy or combination formed between the stockholders of these two railway companies for the purpose of uniting the control of the companies in a third corporation, cannot be separated from the corporations themselves. It is one of those cases where the law recognizes the acts of the stockholders, as the acts of the corporation itself.

In discussing the question of whether the action of the stockholders, acting as individuals, but by virtue of their stock holdings was the act of the corporation, the Court in *People v. North River Sugar Refining Company*, 24 N. E. Rep. 837, said:

> "But here we encounter the stronghold of the appellant's argument, which is that, if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers, and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body,

and, admitting the sins of the latter, to adjudge that the former remains pure. * * *

"The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what, in a given case, has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but, as between it and the state, the substantial inquiry is only what that collective action and agency has done; what it has in fact accomplished; what is seen to be its effective work; what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to to the corporators, the individuals, the acting and living men, to be used by them, to rebound to their benefit, to strengthen their hands, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction."

In the case of *State v. Standard Oil Company*, 30 N. E. Rep., 287. The Court said:

"So that the idea that a corporation may be

a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it when the question is as to whether a certain act was the act of the corporation or of its stockholders, cannot be decisive of the question, and is therefore illogical; for it may as likely lead to a false as to a true result.

"Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient should not be called in question; but where it is urged to an end subversive of its policy; or such is the issue, the fiction must be ignored, and the question determined whether the act in question, though done by shareholders—that is to say, by the persons uniting in one body—was done simply as individuals, and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation, and affect the transaction of its business in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because, the stockholders having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise, then in one department of the law fraud would enjoy an immunity awarded to it in no other."

VIII.

TO ALLOW A CONSOLIDATION OF THE LINES AND PROPERTY OF THESE TWO RAILWAY COMPANIES BY AND THROUGH THE NORTHERN SECURITIES COMPANY, AND TO PERMIT THAT COMPANY TO EXERCISE ITS CORPORATE POWERS OVER SUCH PROPERTY, IN VIOLATION OF THE LAWS OF APPELLANT, WILL DEPRIVE APPELLANT OF A RIGHT GUARANTEED TO IT BY SECTION ONE OF ARTICLE IV OF THE CONSTITUTION OF THE UNITED STATES.

The testimony already referred to shows conclusively that the purpose of the incorporators of the Northern Securities Company, and that Company itself, is to effect a consolidation of the lines and properties of the Great Northern and Northern Pacific Railway Companies in such a way as to evade and violate the laws of appellant.

Prior to the organization of the Northern Securities Company, the Great Northern Railway Company had always held its stockholders' meetings in the State of Minnesota. On November 25th, 1901, it amended its by-laws so that all stockholders' meetings should be thereafter held in the City of New York (See Fol. 3630, also Fol. 4718 of the record.)

The stockholders' meetings of the Northern Pacific Railway Company are also held outside the State of Minnesota.

The purpose of the amendment to the by-laws of the Great Northern Railway Company is to allow

the Northern Securities Company to exercise its corporate powers acquired from the State of New Jersey outside the limits of the State of Minnesota, so that the laws of this State can be violated without such violator entering the State.

Appellant contends that no portion of the sovereign power of any other state can be used directly or indirectly for the purpose of violating the laws of this State. That while the Northern Securities Company is a valid corporation under the laws of the State of New Jersey, and has acquired a portion of the sovereign power of that State, it cannot use its powers so acquired for other than lawful purposes; and that to use such powers for the purpose of violating the laws of this State is unlawful and an invasion of a right guaranteed to appellant under Section one of Article IV of the Constitution of the United States which provides that "*full faith and credit shall be given in each state to the public acts * * * of every other state.*"

If the State of New Jersey had created a corporation, by a special act of its legislature, in the charter of which it was provided that the

> purpose and object of this corporation shall be to acquire the stock of the Great Northern and Northern Pacific Railway Companies, corporations owning and operating railroads in the state of Minnesota for the express purpose of consolidating such corporations in violation of the laws of the State of Minnesota.

such an act, on the part of the State of New Jersey, would have been void, for the reason that New

Jersey would not be giving full faith and credit to the public acts of Minnesota.

New Jersey cannot delegate a part of its sovereign power to a corporation for the express purpose of violating the laws of another state.

The State of New Jersey has, by general law, authorized the organization and creation of corpoations within its borders. By this means it has delegated a part of its sovereign power to such persons as see fit to avail themselves of it. No body of men can appropriate this delegated sovereign power of New Jersey for the purpose of violating the laws of another state, and thus be allowed to do indirectly that which the State of New Jersey, acting directly in the exercise of its sovereign power, cannot do under the constitution.

We, therefore, contend that the Northern Securities Company is powerless to acquire the stocks of the Great Northern and Northern Pacific Railway Companies for the purpose of evading or violating the laws of appellant.

A state, acting in its independent and sovereign capacity, had the right, prior to the adoption of the constitution, to have compelled another State by force if necessary, to observe and treat with respect its laws in case such state had tried to violate the same in the manner above indicated.

As stated by this Court in the case of *Missouri v. Illinois & Chicago District*, 180 U. S. 241:

> "If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force."

When appellant surrendered that right, as it did in accepting the constitution, it and its citizens received from the State of New Jersey in consideration therefor the constitutional compact that the State of New Jersey itself would not, nor would it authorize any one else to, violate its public acts.

The laws of New Jersey, under which the Northern Securities Company was organized provide that a corporation may be formed thereunder "*for any lawful purpose.*" A corporation cannot be organized under this act, for the purpose, declared or otherwise, of acquiring the stocks of railway corporations in violation of the laws of the state where such corporations are created, and transact their business; because that would not be forming a corporation for a "lawful purpose;" nor would such a corporation be engaged in a lawful business. See *U. S. v. Northern Securities Co., et al., supra.*

We have already shown, that the sole intent and purpose of the incorporators of the Northern Securities Company, was to acquire the stocks of the Great Northern and Northern Pacific Railway Companies, for the purpose of consolidation and control. If this is in violation of the laws of the State of Minnesota, then the Northern Securities Company can claim no protection or immunity by reason of being organized under the laws of New Jersey.

IX.

APPELLANT CONTENDS THAT IT HAS THE RIGHT TO AVAIL ITSELF OF THE ACT OF CONGRESS OF JULY 2, 1890, ENTITLED "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES," TO THE EXTENT, AT LEAST, OF DEFEATING THE CLAIM ON THE PART OF THE NORTHERN SECURITIES COMPANY THAT IT HAS THE RIGHT TO OWN THE STOCK OF THE GREAT NORTHERN AND NORTHERN PACIFIC RAILWAY COMPANIES, AND TO CONTROL SAID CORPORATIONS WITHIN THE STATE OF MINNESOTA; AND ALSO TO THE CLAIM OF SAID NORTHERN SECURITIES COMPANY THAT ITS ALLEGED PURCHASE AND OWNERSHIP OF SUCH STOCK GIVES IT CONTRACT RIGHTS, WHICH ARE PROTECTED BY THE CONSTITUTION OF THE UNITED STATES.

The appellant brings this action in its governmental capacity on behalf of all the citizens of the State, as well as in its individual capacity as the owner and trustee of property within the State, and also as a shipper over the lines of railway of the two railway companies in question.

Acting in its capacity as *parens patriæ*, it can enforce an action on behalf of the citizens of the State.

See

Missouri v. Illinois & Chicago Dist., 180 U. S. 208;

Kansas v. Colorado, 185 U. S. 142.

Possibly the appellant cannot maintain an action for the purpose of primarily enforcing the act of Congress. That may be a function which rests alone with the Federal Government.

The act of Congress above referred to, however, is a remedial statute, and an action can be maintained by any person or body of persons who may be injured by its violation; and the State of Minnesota, acting in its sovereign capacity, can maintain an action on behalf of all the citizens of the State when such injury or damage is to the public.

It has been held by this and other courts that any person who sustains an injury by reason of a violation of a remedial statute, or any statute which makes unlawful that which was, prior to its passage, lawful, can maintain an action for, or enjoin such violation.

The act of Congress above referred to in effect declares that contracts or combinations in restraint of trade are a nuisance and injurious to the individual and public welfare. Such being the case, any person, or body of persons, who may be injured by the commission of such a nuisance can maintain an action to enjoin the same.

In the case of *Kaufman v. Stein*, 37 *N. E. Rep.* 333, an action was brought by a private individual to enjoin the erection of a building, the maintenance of which, under an ordinance passed by the City of Terre Haute, was declared to be unlawful. In

passing upon the question as to whether or not such action could be maintained, the Court said:

> "An individual has, and always had, the right to enjoin the erection or continuance of a nuisance, where he will suffer a special injury or annoyance, different in kind and degree to that sustained by the public generally. Keiser v. Lovett, 85 Ind. 240; Reichert v. Geers, 98 Ind. 73; Owen v. Phillips, 73 Ind. 285. In Baumgartner v. Hasty, 100 Ind. 575, at page 579, it is said: 'It is one of the oldest common-law rules that an individual citizen may, without notice, abate a nuisance, and, if necessary, to effectually abate it, destroy the thing which creates.'"

See also,

Wier's Appeal, 74 Pa. St. Reports 230.

Hayes v. Michigan Central Railroad Co., 111 U. S. Reports 228-239.

Union Pacific Railway Co. v. McDonald, 152 U. S. Reports, 283.

Atchison, Topeka & Santa Fe Ry. Co. v. Reesman, 60 Fed. Rep. 370.

In the latter case, Justice Brewer said:

> "The contention of the company is that the fence statute referred to was enacted for the benefit of the proprietors of adjoining lands, and that the plaintiff, as an employe of the railroad company, takes nothing by reason of the failure of the company to comply with its terms. It is doubtless true that when a right is given by statute, only those to whom the right is in terms given can avail themselves of its benefits, but it does not follow that when a duty is so imposed a violation of that duty exposes the wrongdoer to liability to no person other than those specifically named in the statute.

> On the contrary, it is not unreasonable to say that every party who suffers injury by reason of the violation of any duty is entitled to recover for such injuries. At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. It may well be said that, though primarily intended for the benefit of one class, it was also intended for the protection of all who need such protection."

We are not unmindful of the fact, however, that some of the Circuit Courts have held that a private person cannot maintain an action under this statute, excepting for damages; but there is difference of opinion among the different Circuit Courts on this subject, as stated by Judge Phillips in the case of *Greer, Mills & Co. v. Stoller*, 77 Fed. Reporter, 3.

The question has never been fully considered or decided by this Court. In the case of *Bement v. National Harrow Co.*, 186 U. S. 70, quoting from page 87, this Court said:

> "The plaintiff contends in the first place that only the Attorney General of the United States can bring an action under the statute, excepting that by section 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any Circuit Court of the United States in the district in which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon a contract may set up as a defense that it is a violation of the

act of Congress, and if found to be so, that fact will constitute a good defense of the action."

This brings us to another right under this act, which the appellant can assert and enforce against the Northern Securities Company. The latter company claims that because it is organized under the laws of the State of New Jersey, it is outside of the jurisdiction of the State of Minnesota, and that having purchased or acquired the stocks of the Great Northern or Northern Pacific Railway Companies outside of the State of Minnesota, it has contract rights which are protected by the Constitution of the United States, and that under such conditions the appellant can not enforce its laws against it.

A contract is protected by the Constitution in so far only as it is a valid contract. If the contract under which the Northern Securities Company claims to have acquired these stocks is invalid, then there is no contract to be protected. If the acquisition of these stocks in the manner disclosed by the testimony creates or tends to create a monopoly, or restrains, or tends to restrain interstate commerce, or places with the Northern Securities Company the power, although unexercised, to do these things, then it is in violation of the act of Congress above referred to, and can receive no constitutional protection, for the reason that it is not a valid contract right; and as said by this Court in the case of *Bement v. National Harrow Co.*, 186 U. S. 70, above referred to, the appellant can avail itself of this act for the purpose of defeating such a claim.

X.

APPELLANT CONTENDS THAT THE LAWS OF MINNESOTA, PROHIBITING THE CONSOLIDATION OF THESE RAILWAY COMPANIES, AS WELL AS THE STATE ANTI-TRUST ACT OF 1899, IMPOSE OBLIGATIONS UPON THE STOCKHOLDERS OF THESE TWO RAILWAY COMPANIES, WHICH FOLLOW THE STOCK INTO WHATSOEVER HANDS IT MAY PASS, AND CAN BE ENFORCED AGAINST SUCH OWNER OR HOLDER OF THE STOCK WHERESOEVER FOUND.

As stated by this Court in the *Delaware Tax case*, 18 Wall, quoting from page 229:

> "In the first place, the share of a stockholder is, in one aspect, something different from the capital stock of the company; the latter only is the property of the corporation; the former is the individual interest of the stockholder, constituting his right to a proportional part of the dividends when declared, and to a proportional part of the effects of the corporation when dissolved, after payment of its debts. Regarded in that aspect it is an interest or right which accompanies the person of the owner, having no locality independent of his domicile. But whether, when thus regarded, it can be treated as so far severable from the property to which it relates as to be taxable independent of the locality of the latter is a question not necessary now to decide. The argument of the appellant assumes that it is thus severable.
>
> In any aspect, if provision for the taxation of the shares at the locality of the company be made in its charter, their taxability at such locality is annexed as an incident to the shares, and it does not matter where the domicile of the owner may be."

See, also, *Nashua Savings Bank v. Anglo-American Land, Mortgage and Agency Company*, 189 U. S. 221.

At the outset, it is to be noted, that the Northern Securities Company did not purchase the stocks of the two Railway Companies in the open market; but on the contrary acquired such stocks as a result of a conspiracy or combination entered into by its organizers, and subsequent stockholders, for the purpose of violating the laws of this state. It has never purchased a share of stock. It has simply issued its own stock in exchange for the stocks of the Railway Companies; but even though the Northern Securities Company did purchase the stock of these Railway Companies in the open market, as contended, it would still be bound by the laws of this state; and if such ownership is in violation of such laws then it can not own or hold the stocks.

The stockholders of these two Railway Companies have been granted the right, by the State of Minnesota, to be, or to exist as, corporations within the State.

The Northern Pacific Railway Company occupies the position, toward the laws of this state, of a domestic corporation. When it filed its Articles of Incorporation in this state and entered it for the purpose of transacting business, it became, a domestic corporation and agreed to be bound by appellants' laws.

Section 2753 of the Statutes of Minnesota compilation 1894, provides when and how a foreign corporation may do business in the State.

Sections 2754 and 3425 of the Statutes of Minnesota, compilation 1894 provide as follows:

> "§ 2754. That upon and from the filing of its said articles of incorporation as above provided, which shall be deemed to be an acceptance of the benefits of this act, the said corporation is hereby declared to be a legal domestic corporation of this State.
>
> § 3425. No foreign corporations now or hereafter doing business in this state, shall have, possess, or exercise any right, privileges, or immunities not possessed by domestic corporations; but, unless otherwise provided by law, shall in all respects be deemed, if it shall remain in (this) state for sixty days next ensuing after the passage of this act to be a domestic corporation, and entitled to all the rights, privileges and immunities of domestic corporations, subject to all laws of this state which are now in force or may be hereafter enacted."

It is a well settled principle of law, that the public statutes of a state relating to a corporation, become and are a part of the charter of a corporation created in, or permitted to do business in, such state. A part of the consideration which the state receives for granting the right to be a corporation and exercise the powers and privileges as such in the state, is an agreement on the part of such corporation and its stockholders that it and they will observe the laws of the state.

In Supreme Lodge, K. P. v. Weller, 25 S. E., 891, the Supreme Court of Virginia announced this rule in the following language:

> "It is not necessary that the general law should be copied in the charter; it forms an es-

> sential part of it and all parties are bound by its terms, whether copied in the charter or found only on the statute books."

The Supreme Court of Illinois in *People v. Chicago Gas Co.*, 22 N. E. 798, said:

> "The charter of a corporation does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of the charter."

A part of the consideration which appellant received for the lands granted to the Great Northern and Northern Pacific Railway Companies, or the subsidiary companies now controlled by them, was the agreement on the part of such railroad corporations and their stockholders that these lines of railway should be maintained and operated by such corporations, as competing lines, in accordance with the laws of appellant.

As stated, by the Court in the case of *State v. Central Iowa Railroad Company*, 32 N. W. 409:

> "A railroad company having constructed and put in operation its road, in part at least, by public aid in the way of taxation, it has no right to abandon its road or turn it over to another company to the injury of the state or any portion of the citizens."

One of the conditions and considerations demanded by appellant from these corporations for the right to be a railroad corporation and to exercise the powers and privileges of such, within

its borders, is that free and open competition in both freight and passenger rates, shall exist between the lines of railway operated by such corporations; and a violation of these statutes is a violation of the contract rights or obligations of the corporation, as well as of the stockholders thereof, with the state.

This contract obligation to obey the laws of the state rest primarily upon the stockholders of the corporation. It is one of the conditions which the state demands of the persons about to form a corporation. It in effect says to them:

> If you will obey the laws of the state relating to the corporation you wish to form, the state will permit you to organize as a corporation.

This obligation once assumed, as it is when the incorporators file the articles adopted by them and become a corporation, forever after remains upon such incorporators, and all persons succeeding them as stockholders of the corporation.

That this contract is a binding one and cannot be avoided is settled in the case of *Thomas v. Railway Company*, 101 U. S. 71, wherein this Court said:

> "That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the state, to transfer to others

the rights and powers conferred by the charter and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this Court delivered by Mr. Justice Campbell, in the York and Maryland Line Railroad Co. v. Winans, 17 How. 30. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the legislature of that state. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland Company, which appointed all the officers and agents upon it, and furnished the things and its effect upon the liability of the rolling stock. In reference to this state of Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this Court said: 'This conclusion (argument) implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature. *Beman v. Rufford*, 1 Sim. N. S. 550; *Winch v. B. & L. Railway Co.*, 13 L. & Eq. 506."

See also

Gibbs v. Baltimore Gas Co., 130 U. S. 396.
Bank of Augusta v. Earle, 13 Peters, 519.

The stock of the Great Northern and Northern Pacific Railway Companies, the title to which is placed in the Northern Securities Company, must be deemed to be held by the last named company as though located in and subject to all the laws of the State of Minnesota; and every power sought to be exercised by it, by virtue of such stockholding, must be in harmony with and not in violation of the laws of the State of Minnesota.

The situs of the capital stock of a corporation is in the state creating it.

See *Kellenik v. Huron Copper Mining Company*, 177 U. S. page 1.

There it must always rest; and one who purchases it, takes it with knowledge of that fact, and subject to the limitations of the laws of the state where, in law, the stock is located as well as any other State which it may enter.

The Northern Securities Company can acquire no title to this stock, nor exercise any power by reason of this stockholding, or any management or control over the Great Northern and Northern Pacific Railway Companies, which is in violation of or which tends to contravene the laws of appellant.

The stockholders of a corporation, as well as the corporation itself, can perform no acts nor make any contracts either within or without the state creating such corporation, except such as are au-

thorized by its charter or some general law of the State relating to it. It follows as a necesary corollary, that a corporation, as well as its stockholders, can perform no act or make any contract or agreement which violates a remedial statute of a state creating such corporation.

The Northern Securities Company having taken the stocks of these two Railway Companies with full knowledge of the statutory provisions of appellant, it is bound by them. In its articles of incorporation, it states that it was organized to purchase the stock of railway companies, not only in the State of New Jersey, but *any state in the Union*," and when it attempts to acquire the stocks of any corporation created outside of the State of New Jersey, it at that instant becomes bound by the laws of the state creating the corporation, whose stock it attempts to acquire.

On this subject this Court, in *Pinney v. Nelson*, 183 U. S. 150, said:

> "As then a corporation can have no legal existence outside of the state in which it is incorporated, the contract of the stockholders with one another, by which the corporation is created, is presumed to have been made with reference to the laws of that state, nothing being said in the charter to the contrary. But as comity permits a corporation to enter another state and do business therein, it is competent for the stockholders in making their charter to contract with reference to the laws of a state in which they propose the corporation shall do business. And in this case the stockholders in their charter specified that the purpose of the incorporation was partly business beyond the limits of Colorado, and that

the principal part of such outside business should be carried on in California. Not content to rely upon the general authority which by the rules of comity the Colorado corporation would have to enter California, and transact business therein, they in terms set forth that a part of the purpose of the incorporation was the transaction of business by the corporation in California. Now, when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California is it not clear that they were contracting with reference to the laws of that state? Contracting with reference to the laws of that state they must be assumed to know the provisions of those laws, that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the state, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other states and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California? Suppose these same stockholders in Colorado had formed a partnerhip with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and an incorporation of those laws into the liabilities created by the partnership business in California? And if this rule obtains as to contracts of partners between themselves, why not also as to contracts of stockholders between themselves in forming a corporation?"

It is contended by the appellees, the Northern Securities Company, and the Northern Pacific Railway Company respectively, that appellant can not

enforce its laws against either of them, because the first is a stockholder of the second, and the second being a corporation created under the laws of Wisconsin, to enforce the laws of appellant against it as attempted in this case, would be an interference with, or regulation of the internal affairs of the Northern Pacific Railway Company, the regulation of which rests entirely with the state creating it. There are three good and sufficient answers to this contention:

FIRST: The laws of Wisconsin prohibit the consolidation of parallel and competing lines of railway in almost identically the same language as those sought to be enforced in this action, and for this reason there is no conflict of regulation. The rights acquired by the Northern Pacific Railway Company from the State of Wisconsin are subject to the same conditions as are imposed by the laws of appellant sought to be enforced in this action. Therefore the Northern Pacific Railway Company, or its stockholders have no rights granted by the State of Wisconsin, which are in any way infringed upon or taken away by an enforcement of the laws of appellant.

SECOND. That under the laws of appellant relating to the admission of foreign corporations within its borders, which laws have already been referred to, such foreign corporation must file its Articles and becomes a domestic corporation, the same as though incorporated within the State. This makes such foreign corporation a domestic one with the

same Articles as those adopted in the State where the corporation was first formed; such being the case, the appellant has full power and authority to regulate and control the method of voting the stock of that corporation, especially in so far as such voting relates to and controls property within its borders.

THIRD. Under the Articles of Incorporation of the Northern Pacific Railway Company, adopted in Wisconsin, and afterwards filed with appellant, said corporation is authorized and empowered to build, operate and maintain railroads in and through the State of Minnesota. (See Fols. 4544-4545 of the record; also Fols. 4595-4596 of the record).

Under the decision of *Pinney v. Nelson*, above referred to, the stockholders of the Northern Pacific Railway Company are as fully bound by the laws of appellant in relation to their rights and obligations as such stockholders, as though incorporated in the first instance under the laws of appellant.

But, regardless of either one of these grounds, appellant can enforce its laws, so as to prevent the consolidation of the lines of railway of the Northern Pacific and Great Northern Railway Companies. The Great Northern Railway Company is a corporation created by appellant; and the Northern Pacific Railway Company can have no power or authority to build, own or operate any railway lines within the borders of appellant,excepting by authority or permission granted by or obtained from it. When the latter company made application to file its Articles of Incorporation with appellant, and

such filing was allowed, it was on condition that, as to all property within its borders, its laws should be supreme; and by so filing its Articles, the stockholders of the Northern Pacific Railway Company accepted those conditions and became bound by them.

The right to own and vote stock are rights which the stockholder can part with or waive. These rights do not relate to the internal affairs of the corporation, but rest entirely with the stockholder; and when such stockholder or stockholders make application to a state, other than that creating the corporation, for the right to do business and own property within such state, they then agree to be bound by such conditions as the laws of the state to which they make application may impose; and it is to this extent and in relation to these obligations and conditions appellant is endeavoring to enforce its laws.

In this connection, the Court should continually bear in mind that the Northern Securities Company is but a device and scheme, through which the stockholders of these two companies seek to unite the voting power of the stock. Each stockholder of the Northern Pacific Railway Company has simply turned his stock over to the Northern Securities Company, and received therefor the stock of the latter company. The same is true of the Great Northern stockholders. The stockholders of the two railway companies thus make the Northern Securities Company a mere voting trustee, virtually pooling the voting power by means of this device.

XI.

WHAT WE HAVE SAID IN THE PRECEDING SUBDIVISION AS TO THE ANTI-CONSOLIDATION LAWS BEING OBLIGATIONS IMPOSED UPON THE STOCKHOLDERS AND FOLLOWING THE STOCK, IS EQUALLY TRUE OF THE LAWS OF 1899, KNOWN AS APPELLANT'S ANTI-TRUST LAW.

The act above referred to, in so far as its provisions are applicable to this case, is as follows:

> "Section 1. Any contract, agreement, arrangement, or conspiracy or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this State, or in restraint of trade or commerce between any of the people of this State and any of the people of any other State or Country, or which limits or tends to limit or control the supply of any article, commodity or utility, or the articles which enter into the manufacture of any article (of) utility, or which regulates, limits or controls or raises or tends to regulate, limit, control or raise the market price of any article, commodity or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production, puchase or sale of any commodity, article or utility is hereby prohibited and declared to be unlawful.
>
> That when any corporation heretofore or hereafter created, organized or existing under the laws of this State, whether general or special, hereafter unites in any manner with any other corporation wheresoever created, or with any individual whereby such corporation surrenders or transfers, by sale or otherwise, in

whole or in part, its franchise, rights or privileges or the control or management of its business to any other corporation or individual, or whereby the business management or control of the business of such corporation is limited, changed or in any manner affected, and the purpose or effect of such union or combination is to limit, control or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of any article or commodity or the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination is to control or monopolize in any manner the trade or commerce, or any part thereof, of this State, or of the several States, such union, combination, agreement, arrangement or contract is hereby prohibited and declared to be unlawful.

* * * * * * *

Sec. 3. Any corporation heretofore or hereafter created, organized or existing under the laws of this State which shall hereafter either directly or indirectly make any contract, agreement or management, or enter into any combination, conspiracy or trust as defined in section one (1) of this act, shall, in addition to the penalty prescribed in section two (2) of this act, forfeit its charter, rights and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust or monopoly, except as to the final disposition of its property under the laws of this state.

* * * * * * *

Sec. 6. That for the purpose of carrying out the provisions of this act, any citizen of this State may, and it is hereby declared to be the duty of the Attorney General to, institute, in the name of the State, proceedings in any court

of competent jurisdiction against any person, partnership, association or corporation who may be guilty of violating any of the provisions of section one (1) of this act, for the purpose of imposing the penalties imposed by this act, or securing the enforcement of section three (3) hereof.

Sec. 8. This act shall take effect and be in force from and after its passage.

Approved April 21st, 1899."

Section 1 is practically identical with section 1 of the National Anti-trust act, except that it contains added provisions. The only difference, except the additional provisions, is the re-arrangement of words contained in a single sentence.

A reading of the state law shows how far reaching it is in its application to any form of combination or conspiracy, agreement or arrangement, which restrains, or tends to restrain, or limits or tends to limit in any way, the price of a commodity or article, or its free and uninterrupted transportation. The same interpretation as to the application of this act to railroads must be given as is given to the Federal Anti-trust act, excepting that the state act, in its direct application, must be limited to state commerce. That this law is applicable to railroads is fully settled by the case of

United States v. Freight Association, 166 U. S. 290.

United States v. Joint Traffic Association, 171 U. S. 504.

It is equally well settled in these cases that such statutes prohibit the entering into of any contract,

agreement, arrangement or conspiracy or any combination in the form of a trust or otherwise, which lodges in any association or corporation *the power* to restrain trade or commerce between states.

It was also held in the Joint Traffic Association case, (page 571) that, "the cases cited by counsel in regard to the constitutional right of the citizen to make contracts relating to his lawful business, are not inconsistent with the existence of the power in Congress to prohibit contracts of the nature involved in this case."

For limitations as to the right of citizens under various circumstances to make contracts, see

Frisbee v. United States, 157 U. S. 160.

The provisions of this act of appellant being taken largely from the Federal Anti-trust act, the same interpretation given to the latter act should be given to this.

See

Ryalls v. Mechanics Mills, 5 L. R. A. 667.

Metropolitan Railroad Company v. Moore, 121 U. S. 558.

It will doubtless be contended by appellees here as it was in the court below, that because the act is broader in its language that the National act, it has no application to railroads or railway traffic. Also that the enactment by appellant of a state railroad and warehouse commission act shows that the act in question was not intended to apply to rail-

roads. These two contentions are fully answered in the cases above referred to.

Doubtless it will also be contended by appellees as it was in the court below that this act can have no application to the Northern Securities Company because that Company was formed outside of appellant, and acquired the stock of the Northern Pacific and Great Northern Railway Companies outside the borders of appellant; and that the enforcement of this law will deprive the Northern Securities Company of a constitutional right to freely contract and acquire property. These contentions are further answered by what we have said in subdivisions VIII, IX and X of this brief.

If it should be contended by counsel for appellees before this court, as it was in the court below, that the appellant has no power to pass and enforce an anti-trust law similar to the one under consideration, for the reason that it interferes with commerce and the freedom of contract, we call the Court's attention to the following language from the decision of this court in *United States v. Knight*, 156 U. S., 11:

> "It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and

the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power.

* * *

It is vital that the independence of the commercial power and of the police power, and the delimination between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

XII.

It was contended by counsel for appellees in the Court below, and doubtless the same claim will be made before this Court, that, to enforce these laws of appellant prohibiting the consolidation of parallel and competing lines, as well as the State Anti-trust act, will amount to an interference with interstate commerce. In answer to this, we call the attention of the Court to the language used in *Louisville & Nashville Railway Company v. Kentucky*, 161 U. S. 677, as follows:

> "But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less, with commerce between the states, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of transportation, by the expenses incurred in conforming to such regulations. These are, however, like the taxes imposed upon railways and their rolling stock, which are more or less according to the policy of the state within which the roads are operated, but are still within the competency of the legislature to impose. It is, otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden. There are certain intimations in some of our opinions, which might perhaps lead to an inference that the police power cannot be exercised over a subject confined

exclusively to congress by the Federal Constitution. But while this is true with respect to the commerce itself, it is not true with respect to the instruments of such commerce.

It was said in Sherlock v. Alling, 93 U. S. 99, 103, 104 and quoted with approbation in Plumley v. Massachusetts, 155 U. S. 461, that 'in conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislation on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution, * * * and it may be said, generally, that tht legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotedly affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce foreign or interstate, or in any other pursuit."

"It has never been supposed that the dominant power of congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for their interests of the public may seem to render desirable. In the division of authority with respect to interstate railways congress reserves to itself the superior right to control their com-

merce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

If it be assumed that the states have no right to forbid the consolidation of competing lines, because the whole subject is within the control of congress, it would necessarily follow that congress would have the power to authorize such consolidation in defiance of state legislation—a proposition which only needs to be stated to demonstrate its unsoundness. As we have already said, the power of one railway corporation to purchase the stock and franchises of another must be conferred by express language to that effect in the charter, and hence, it will be conceded that it would have no power to make the proposed purchase in this case. As the power to purchase, then, is derivable from the state, the state may accompany it with such limitations as it may choose to impose. It results, then, from the argument of the appellant that, if there be any interference with interstate commerce it is in imposing limitations upon the exercise of a right which did not previously exist, and hence, if the state permits such purchase or consolidation, it is bound to extend the authority to every possible case, or expose itself to the charge of interfering with commerce. This proposition is obviously untenable.

While the constitutional power of the state in this particular has never been formally passed upon by this court, the power of state legislatures to impose this restriction upon the general authority to consolidate has been recognized in a number of cases. Railroad Co. v. Maryland, 21 Wall. 456, 470; Shields v. Ohio, 95 U. S. 319; Wallace v. Loomis, 97 U. S. 146, 154; New Buffalo v. Iron Co., 105 U. S. 73; Leavenworth v. Chicago &c. Railway, 134 U. S. 688, 699; Livingston County v. Portsmouth

Bank, 128 U. S. 102; Keokuk & Western Railroad v. Missouri, 152 U. S. 301; Ashley v. Ryan, 153 U. S. 436. In the last case it was broadly held that a state, in permitting railway companies to consolidate, might impose such conditions as it deemed proper, and that the acceptance of the franchise implied a submission to the conditions, without which it could not have been obtained.

The power to forbid such purchase or consolidation with competing lines has been directly upheld in a large number of cases in the state courts, in some of which cases a violation of the commerce clause was suggested, and in others it was not. Hafer v. Cincinnati, Hamilton & Dayton Railroad, 29 Wkly Law Bull. 68; State v. Atchison & Red River Railroad, 24 Nebraska,, 143; Gulf, Col. & Santa Fe Railway v. State, 72 Tex. 404; East Line &c Railway v. Rushing, 69 Texas, 306; Pennsylvania v. Commonwealth, 7 Atl. Rep. 368; Montgomery's Appeal, 136 Penn. St. 96; Currier v. Concord Railroad, 48 N. H. 321; Texas & Pacific Railway Co. v. Southern Pacific Railway Co., 41 La. Ann. 970. See also Langdon v. Branch, 37 Fed. Rep. 449; Hamilton v. Savannah &c Railroad, 49 Fed. Rep. 412; Clark v. Central Railroad, 50 Fed. Rep. 338; Kimball v. Atchison, Topeka &c Railroad Co., 46 Fed. Rep. 888."

XIII.

THE ACQUISITION BY THE NORTHERN SECURITIES COMPANY OF THE MAJORITY OF THE CAPITAL STOCK OF THE RAILROAD COMPANIES IN QUESTION, CREATED A COMMON LAW MONOPOLY IN RAILROAD PROPERTIES AND TRAFFIC IN THE NORTHERN HALF OF MINNESOTA, WNICH IS NOT ONLY A VIOLATION OF THE STATUTORY ENACTMENTS, AS WE HAVE URGED, BUT OF THE COMMON LAW OF THE STATE, AND WHEN CONSUMMATED IN NEW JERSEY TO TAKE EFFECT IN MINNESOTA, IS ALSO A VIOLATION OF THE FEDERAL CONSTITUTION.

In *United States v. Freight Association*, 166 U. S. 327-8, in determining that the Sherman act applied to railroad traffic and prohibited all contracts in restraint of trade, or *which empowered an Association to restrain trade or commerce*, whether such restraints were reasonable or unreasonable, this Court said:

> "Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade."

It was stated that all contracts in unreasonable restraint of trade were void at common law.

It will be conceded that by an unbroken line of authorities it is settled, that monopolies in restraint of trade, not authorized by statute, are illegal at

common law, independent of statutory or constitutional prohibition.

This is the rule adopted in Minnesota and it has been held by the highest court in that State to apply to traffic arrangements entered into by railroads and to railroad properties.

Stewart v. Erie & Western Transportation Co., et al., 17 Minn. (Gil. 348) 372.

In the case at bar the stockholders (i. e., the owners) of two competing railway companies created a device by means of which they blended their capital stock, and each obtained a mutual interest in the property of competitors. The Great Northern stockholders became joint owners in essence of the Northern Pacific Railway and *vice versa*. Each stockholder in substance traded a part of his holding by means of a plausibly constructed device, with a net result that by blending the properties the motive for competition ceased and competition was absolutely stricken down. We submit, the striking down of competition—1, created a monopoly; and 2, was an act restraining trade and commerce.

Among the mutiplicity of authorities discussing the general question attention is called to *Bishop v. American Preservers Co.*, 157 Ill. 284, in which the court held that "an agreement providing for the welding together of all the interests engaged in a certain business into one giant combination or partnership, under the absolute dominion and control of a board of trustees, is void, as contrary to public policy."

Attention is also called to the case of *Attorney General v. Great Northern Ry. Co. of England*, reported in 1st Drewry & Smales Chancery Reports, 154. It appears the railway company had in a crafty manner entered into the business of selling coal and established a monopoly therein. The court upon the ground that a practical monopoly existed and that an absolute one could readily be perfected, enjoined the railway company from dealing in coal at all. The decision was placed upon the ground that monopolies were against sound public policy.

An examination of complainant's Exhibit Number 9, being a railroad map of the State of Minnesota, Folio 3197, will show at a glance that the consolidation of substantially all of the capital stock of the Northern Pacific and Great Northern Railway Companies in the hands of the Northern Securities Company will create an absolute monopoly in railway traffic in the northern half of Minnesota, except upon the iron ranges in the extreme northeast corner of the State.

In 1895 the effect of the practical consolidation of the Northern Pacific and Great Northern Railway Companies was under consideration in this court, and in deciding the question it was said:

> "The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly reflected the general sen-

timent of the public that their best security is in competition."

Pearsall v. Great Northern Ry. Co., 161 U. S. 677.

Since 1895 an additional through line has been constructed by the Great Northern and many spur lines have been built by both companies in northern Minnesota. Therefore a monopoly in railway traffic is far more extended and complete now than then, and it is submitted:

1st, that a practical consolidation of the Great Northern and Northern Pacific Railway Companies has been perfected in the Northern Securities Company by the consolidation of substantially all of their capital stock therein. 2nd, that this blending of stock was the result of the mutual acts of the stockholders of the company. 3rd, That the purpose and design of the incorporators of the Northern Securities Company in creating it, as shown by the evidence of Mr. Baker, Mr. Thorn and Mr. Kennedy, was to strike down competition between the Great Northern and Northern Pacific Railway Companies. In other words, to put the stock in single hands where it would be perpetually held, as they graphically said, where the stockholders of the respective companies would not fight one another. 4th, The injurious affect resulting from the striking down of competition is already apparent and abundantly appears from the evidence of Mr. Addison Leach, Mr. O. C. Beck, Mr. Frank E. Weld and

Mr. E. Weideman, offered on behalf of the complainant.

We submit not only that an unreasonable restraint upon trade and commerce within but that a monopoly in railways and railway traffic in the State of Minnesota has been affected, and that beyond cavil Chapter 359 of the laws of 1899 (heretofore brought to the attention of the court, which prohibited the making of all contracts or arrangements in restraint, or vested in any one *the power* to restrain trade, whether such restraint be a reasonable or unreasonable one, was intended to be, and has been, violated.

Independent of the contractual relation existing between the Northern Securities Company, as a stockholder of the Great Northern Railway Company, and the State of Minnesota, which obligated the former to obey the laws of the latter (Pinney v. Nelson, 183 U. S. 144), we submit that all acts of the stockholders of said railway company performed in New Jersey affecting property rights in Minnesota, done for the purpose of offending and resulting in a violation of, the laws of the State of Minnesota, may be checked by injunctional proceedings. If this be not so, a conspiracy formed in one State to be executed in another, and which operates to violate its laws may go unchecked. Any plan to violate the policy of one State, no matter how grave, may be executed in another; a battery of heavy artillery may be planted in the State of Wisconsin, and its managers, unless checked, easily destroy millions of dollars of real property in Min-

nesota. In such a case, independent of interference by the government, does any one urge that the courts are powerless to protect property interests? If so, the scheme of government established by the framers of the Federal Constitution is in a degree a failure, and the "more perfect union" referred to in the preamble of the Constitution, fails of accomplishment.

It is submitted that Section 1 of Article IV of the Constitution, providing that "full faith and credit shall be given *in each State* to the public acts, records and judicial proceedings of every other State," must be construed as something more than a clause having reference to the exemplification of records.

XIV.

MONOPOLIES IN, AND ALL ATTEMPTS TO MONOPOLIZE, TRADE OR COMMERCE AMONG THE SEVERAL STATES, ARE PROHIBITED BY THE FEDERAL ANTI-TRUST ACT.

We have elsewhere herein attempted to sustain the proposition by authority, that the State of Minnesota in its individual capacity may invoke the acts of Congress of the United States for the protection of its proprietary interests in property against irreparable injury. It abundantly appears from the record that the State is the owner of a large number of state institutions situated at junction points on the Great Northern and Northern Pacific lines of railway, and annually purchases large amounts of supplies both at points within and without the State of Minnesota, and is interested in the preservation of competition between railway carriers of both state and interstate traffic. It also appears from the record that the State is the owner of hundreds of thousands of acres of land contiguous to these lines of railway, which according to the evidence of W. P. Christenson (Fols. 2942 to 2950) and George A. Flynn (Fols. 57 to 74) will be lessened in value by the striking down of competition between such railway companies.

Attention is called to Par. 2 of Article VI of the Federal Constitution which reads:

"This constitution and the laws of the United

> States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

This section read in connection with the commerce clause makes more pertinent the question as to the force and effect of Section 2 of the Act of Congress of 1890, known as the Anti-trust Act, which reads:

> "Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

What has been urged in the preceding paragraph with reference to the creation of a monopoly in railway traffic in Minnesota, applies with equal force to interstate traffic carried on by these railroad companies, as well as to the railroad companies themselves which are the instrumentalities of such commerce.

We submit: 1st, That the acts of the Northern Securities Company and its promoters in pooling the capital stock of the Northern Pacific and Great Northern Railway Companies in single hands, offends the section of the Act of Congress above quoted, by the creation of a monopoly in both interstate traffic and the instrumentalities engaged in carrying on commerce among the several states. 2nd, That the device itself, to-wit: a holding company, created for the purpose of carrying out the plan of its pro-

moters in the manner established in the record, also tends to the creation of a monopoly and is an unlawful creation.

By this plan fifty-one per cent of the capital stock of the Great Northern and fifty-one per cent of the capital stock of the Northern Pacific Railway Companies, in the hands of the Northern Securities Company, may control the destinies of both companies. The owners of practically one-half of the capital stock of these railway companies by the use of such a device as the Northern Securities Company, may, after the exchange of their stock for one hundred per cent of its capital stock, incidentally place upon the market and sell forty-nine per cent of such stock; and the same individuals by the creation of a Southern Securities Company and in turn, an Eastern Securities and an English Securities Company, may go on diluting their actual holdings until one or two per cent of the actual value of fifty-one per cent of the capital stock of the Great Northern and Northern Pacific Railway Companies, may dominate the English, Eastern, Southern, and Northern Securities Companies respectively.

Can it be urged that a plan which permits this is not in itself vicious and unlawful as tending to create a monopoly?

XV.

IT IS CLAIMED BY COUNSEL FOR APPELLEES THAT CHAPTER 86 OF THE LAWS OF 1903 OF APPELLANT AMOUNTS TO A LEGISLATIVE CONSTRUCTION OF THE ANTI-CONSOLIDATION ACTS OF 1874 AND 1881, AND SHOWS THAT THE LEGISLATIVE BODY OF APPELLANT DID NOT CONSIDER THAT SAID ACTS PROHIBITED A CONSOLIDATION BY THE STOCKHOLDERS OF A RAILROAD CORPORATION ACTING AS SUCH. THE ACT OF 1903 READS AS FOLLOWS:

> "Section 1. The consolidation of the capital stock, lines, property, franchises, control, or the power of control, of two or more parallel and competing lines of railroad in the hands of any corporation, trustee, agent or representative of any corporation, wheresoever situated, is hereby prohibited and made unlawful.
>
> "Sec. 2. This act shall take effect and be in force from and after its passage."

This act was passed in the spring of 1903, after the State had instituted these proceedings against the appellees. Statements were being made in the public press that some other means or device would be resorted to in order to accomplish the results desired by the promotors of the Northern Securities Company, in case they were defeated in these proceedings; and this act presumably was passed by the legislature as an additional precautionary measure. At that time the Attorney General, acting under the request embodied in a resolution of the State Senate, had under consideration the alleged consol-

idation of the Iron Range railroads of Northeastern Minnesota.

It was found, as appears from the report of the Attorney General to the Senate that the capital stock of one of these railroad companies was lawfully vested in the Minnesota Iron Company; that the capital stock of the other was lawfully owned by the Consolidated Mines Company, a New Jersey corporation, the stock of which was owned by the United States Steel Company. While in turn the stock of the Minnesota Iron Company was owned by the Federal Steel Company, the capital stock of which had been purchased by the United States Steel Company.

Thus the United States Steel Company, by the acquisition of the capital stock, at remote periods, of time, *of two manufacturing companies*, and without owning the capital stock of, and without corporate action by any railway company, still became possessed of the *power of control* of two competing railway lines. To prohibit a recurrence of such an act, the statute under consideration was passed.

It can in no way be claimed as a legislative interpretation of the then existing laws. The word *"stockholder"* is no where used in the act.

In construing what force or effect should be given to any claimed legislative interpretation of an existing law, the Court in *Rural Independent School District No. 10 v. New Independent School District of Kelly, et al.*, 94 N. W. Rep., quoting from page 286, said:

"Since the proceedings involved in this case were commenced, the Legislature has amended Code, § 2794, so as to make it directly applicable to such a case as the one now before us (29 Gen. Assem. p. 77, c. 126) and counsel for plaintiff contends that this legislative recognition of the necessity for an amendment in order to cover such a case is an admission that previously the statute did not cover the case. We need not, however, assume to be so ignorant of the methods of legislation as to profess not to know that a statute may be insufficient in its language to carry out the legislative intent, and that when difficulties arise in its interpretation, the Legislature is likely to change the language so as to make its application clear in other cases, even though the amendment could not be effective as to the case in which the difficulty has arisen. It is quite as likely that the language of the amendment was intended to make the statute correspond to what had previously been supposed or assumed to be the law as that it was thereby intended to change the general intent and purpose of the law."

The Supreme Court of appellant, in passing upon this same question in *Bingham v. Supervisors of Winona Co.*, 8 Minn. 397, said:

"It is further urged by appellant, that the legislature itself has given a construction to the section under which these fees are claimed, and which he deems conclusive of the question. * * *

If the repeal of the statute named is to be regarded as a construction of that legislature, to the effect that the statute was then in force, and that by virtue of it the treasurer was entitled to the fee therein named, this fact could by no means have the conclusive effect claimed for it by appellant. It is only the intent of the legislature which enacts a statute that is to

govern courts in the construction thereof. The opinion of a subsequent legislature upon the meaning of a statute is entitled to no more weight than that of the same men in a private capacity. (7 Johns. 508). But it is by no means certain that the legislature of 1860 placed this construction on the statute. It is at most only an implication from the fact of repealing the same, a thing which the legislature might well have done in view of claims asserted under it, even were it believed that such claims were unauthorized by it. An argument or inference of this nature must be quite unsatisfactory to a court in determining the true construction of the statute."

In the case of *Larned v. City of Syracuse*, 44 N. Y. Supplement, page 856, the Court said:

"It is urged that the legislative construction, by Chapter 950 of the laws of 1895, of sections 155 and 156, as they existed when this action arose, controls the rights of these litigants, and is binding on the courts. The constitution of this state vests all judicial powers in the courts, and none in the legislature; and the latter is without power, under the constitution, to enact that pre-existing statutes shall be construed so as to affect causes of action then existing or actions then pending, as prescribed by the subsequent and declaratory act. (Citing a large number of cases). The amendments to sections 155 and 156 made by chapter 950 of the laws of 1895 have no effect on this litigation" and are entitled to no weight by this court.

XVI.

If it should be claimed by appellees in this Court, as it was in the Court below, that Chapter 229 of the laws of appellant for the year 1899 is an adoption of the language used by this Court in the case of *Pearsall v. The Great Northern Railway Company*, we call the Court's attention to the following:

An inspection of the law of 1899 shows that it is an amendment of the law of 1881 only to the extent of permitting foreign corporations to do what domestic corporations were authorized to do under the latter act; and evidently out of precaution, the legislature incorporated into the act of 1899 the same exceptions as those contained in the act of 1881, so that there could be no chance of any claim, being made by a foreign corporation that it possessed powers other than those possessed by a domestic corporation. Nothing appears from the act to show that it was an adoption or ratification of the language used in the Pearsall case, and from which so much is claimed by the appellees. This Court did not have before it for decision in the Pearsall case, any of the questions presented in this action, nor was such a construction given to the statute of either 1874 or 1881 as would justify a claim at this time that in the passage of the act of 1899, such a construction was accepted and approved.

The one prominent fact in the Pearsall case known to the public generally in the State of Minnesota, was that the attempted consolidation of the

two railway companies had been prevented by that decision. No legislative body would have examined that case for the purpose of finding whether or not any language was used by way of illustration or otherwise, which would justify the claims now made by appellees. In fact we contend at the present time, and it seems to us correctly, that the language used in the Pearsall case does not justify or approve the consolidation of these two railway companies under the present scheme or device.

The cases to which we have already called the Court's attention on legislative interpretation in the preceding subdivision are equally applicable to this question, and we refer the Court to those cases in considering this proposition.

XVII.

THE APPELLANT CAN MAINTAIN THIS ACTION IN ITS INDIVIDUAL CAPACITY AND ALSO IN ITS SOVEREIGN CAPACITY AS *parens patriae*.

It is alleged in the bill of complaint, and admitted by the answers, that the appellant is the owner of a large amount of lands, and also trustee for another large portion of lands set aside for school purposes; which lands are located along, or near the lines of railway of the Great Northern and Northern Pacific Railway Companies in Minnesota; also that the appellant is the owner of, and maintains a large number of charitable institutions, and is a large shipper of freight to said institutions, a number of which are reached only by the lines of the Great Northern and Northern Pacific Railway Companies.

From the testimony it appears that these lands will be more valuable with two competing railroads reaching them than when reached by only one or two roads under a single ownership. (See Fols. 2920 to 2962 of the record; also Fols. 56 to 103 of the record, and Exhibits 1 to 6 inclusive, found at Fols. 2975 to 3026 of the record).

Such being the case it has been held by this Court that such an action as this can be maintained.

See *Pennsylvania v. Wheeling Bridge Co.*, 9 Howard 647.

Same case, 11 Howard, 528.

Same case, 13 Howard, 518.

Same case, 18 Howard, 421.

Louisville & Nashville Ry. Co. v. Kentucky, 161 U. S. 677.

Also *Penn. Ry. Co. v. Commonwealth*, 7 Atlantic Rep. 371.

State v. Standard Oil Co., 30 N. E. Rep. 279.

Trust Co. of Georgia v. State of Georgia, 48 L. R. A. 520, where Court said:

> "Our conclusion, therefore, both from reason and a decided weight of authority, is that the State in its sovereign capacity can appeal to the courts for relief by injunction whenever either her property is involved, or the public interests are threatened and jeopardized by any corporation, especially one of a public nature like a railroad company seeking to transcend its powers and to violate the public policy of the State."

If it should be contended by counsel for the defendants that the State can not maintain this suit in its capacity as *parens patriae*, or for the benefit and protection of all the citizens of the State, then we call the Court's attention to the case of *Missouri v. Illinois & Chicago District*, 180 U. S. 241, where this Court said:

> "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be concluded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and de-

fend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.

"The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Missisippi River are not alone concerned, but contagious and typhodal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State.

"That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

Also in Re Debs, 158 U. S. 564, where the Court said:

"That while it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes its duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary inter-

est in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties."

Also the case of Kansas v. Colorado, 185 U. S. 142, where the Court said:

> "As will be perceived, the court there rules that the mere fact that a State has no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae*, trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justifiable under the Constitution."

See also L. & N. Ry. Co. v. Kentucky, supra.

State v. Ohio State Oil Co., 47 L. R. A. 630.

The magnitude and importance of this action is self evident from the issues framed and evidence submitted. The judgment of this court thereon must determine whether a sovereign state of this Union is powerless to vindicate the majesty of its own laws.

The fact that these two Railway Companies have been consolidated in and a perpetual control secured by a single corporation is not disproved by a word of testimony in this case. The only defense interposed, is a plea that such consolidation was

necessary in order to preserve the united control that Mr. Hill and Mr. Morgan and their associates most urgently desire, followed by a declaration of good intentions on their part, framed in alluring visions of benefits they intend to bestow upon this and other states. The appellees seem to think this excuse and painted vision a justification for the flagrant violation of the laws of this and other states. The Court must bear in mind that seven states are practically dependent upon the railroads controlled by the Northern Securities Company, for their transportation facilities; and that these seven states embrace nearly one-twelfth of the area of the United States and contain within their borders nearly one-tenth of the total population of the United States. While it is not a part of the duty of the State of Minnesota to enforce the rights of the citizens of any other state, and it does not seek to do so, we call the Court's attention to these facts only to show that these other states, as well as Minnesota, will be powerless to protect themselves against this monopoly if relief is denied in this action. If what is attempted to be done by those appellees can be successfully accomplished, the States of this Union are powerless to enforce their remedial statutes, and corporate instrumentalities created by them, become more powerful than their creator.

Under the constitution, the national government is powerless to aid a state in regulating and controlling its own corporations; and the judgment of the court in this action, in its final application,

will determine whether a state, having adopted the constitution and entered the Union, is also powerless to esforce its constitutional enactments for the regulation of corporations created by it; and whether a corporation created by another state can be used as a means for evading and violating such enactments.

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Attorney General.

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GEORGE B. WILSON,
Of Counsel.



JAN 12 1904
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 438.

STATE OF MINNESOTA, APPELLANT,

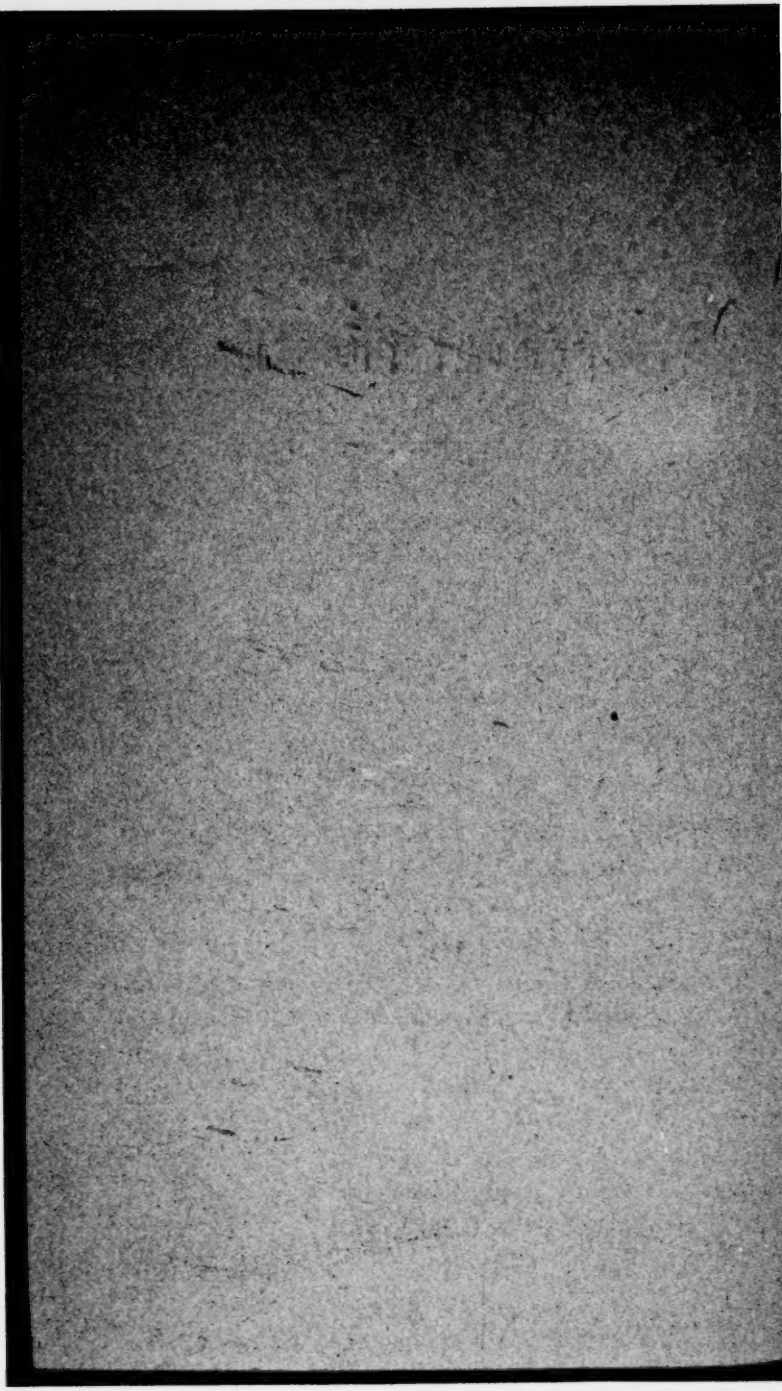
vs.

THE NORTHERN SECURITIES COMPANY ET AL.

ADDITIONAL AUTHORITIES OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

W. B. DOUGLAS,
M. D. MUNN,
GEORGE P. WILSON,
Counsel for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9878



Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 433.

STATE OF MINNESOTA, APPELLANT,

vs.

THE NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, ET AL., APPELLEES.

ADDITIONAL AUTHORITIES OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

It is not necessary that the court below should have decided the constitutional questions relied upon by complainant, or claimed by appellee, in order to give right of appeal to this court under the judiciary act of 1891. (See Erie *vs.* Purdy, 185 U. S., 148; Holder *vs.* Aultman, 169 U. S., 88; Detroit Railway Company *vs.* Aultman, 189 U. S., 386; Minneapolis and St. Louis Railway Company *vs.* Gardner, 177 U. S., 340.)

Reference to the following historical facts shows that the framers of the Constitution intended by article IV that in each State full faith and credit should be given to the laws of the other States.

1.

Article IV of the original Articles of Confederation contained the following: "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State."

2.

Article XVI of the draft of the Constitution reported to the Convention by the Committee of Five on August 6, 1787, reads as follows: "Full faith shall be given in each State to the acts of the legislature and to the records and judicial proceedings of the courts and magistrates of every other State." (See page 123, volume IV, Elliot's Debates.)

In Convention, on August 29, Mr. Williamson moved to substitute for article XVI the language used in article IV of the Articles of Confederation, and said that he did not fully understand the meaning of article XVI as reported by the committee. Mr. Pinckney moved to commit article XVI to the committee.

Mr. Randolph moved the following proposition as a substitute, and asked that it be also committed: "Whenever the act of any State, whether legislative, executive, or judicial, shall be attested and exemplified under the seal thereof, such attestation and exemplification shall be deemed in

other States as full proof of the existence of that act, *and its operation shall be binding in every other State in all cases to which it may relate and which are within the cognizance and jurisdiction of the State wherein the said act was done.*" This was committed with article XVI.

Mr. Morris moved to commit the following proposition on the same subject; which was done: "Full faith ought to be given in each State to the public acts, records and judicial proceedings of every other State, and the legislature shall, by general laws, determine the proof and effect of such acts, records and proceedings." (See pages 487 and 488, volume V, Elliot's Debates.)

3.

On September 1 the committee to which was referred all of the foregoing reported the following as a substitute for article XVI, as originally submitted: "Full faith and credit *ought* to be given in each State to the public acts, records and judicial proceedings of every other State, and the 'legislature' *shall*, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect which judgments obtained in one State shall have in another."

4.

On September 3, on motion, the words "judgments obtained in one State shall have in another" were stricken out and the word "thereof" inserted. The words "ought to," in

the first line, were, on motion, changed to "shall," and the word "shall" between "legislature" and "by general law" was, on motion, changed to "may." (See page 504, volume V, Elliot's Debates.)

The revised draft of the Constitution, as finally reported to the Convention, substituted for the word "legislature" the word "Congress."

Congress has provided that the acts of the legislature of any State or Territory or of any country subject to the jurisdiction of the United States shall be authenticated by having the seal of such State or Territory or country affixed thereto. (Sec. 905, Revised Stat. of U. S., 2d edition.)

At the time this article of the Constitution was drafted the States had the right, in case any of their laws were violated or disregarded by any other State, or the citizens of any other State, to negotiate for recognition and enforcement of the same. Failing in this, such State had the right to compel, by force if necessary, recognition of and respect for its laws. (See Missouri *vs.* Illinois, 180 U. S., 241.)

The more perfect union sought to be accomplished by the framers of the Constitution would fail, if after its adoption and the surrender by the States of the right above referred to, any other State or the citizens thereof could violate the laws of a sister State in so far as they relate to property situated within the State and were valid under the Constitution. The question of priority of action could not arise because each State, after adopting the Constitution, could only legislate relating to property, property rights within the State, and relating to the rights or obligations of citizens of the State. It seems to us that the intention of the framers

of the Constitution was to prevent a violation of such legislation by any person or by any State or the citizens thereof, acting outside the territorial limits of the State whose laws were sought to be avoided or violated.

Respectfully submitted.

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